Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

JOHN CONLEE ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Administrative Law Judge's credibility determinations have, as a matter of law, so far departed from the accepted and usual course of administrative judicial proceedings that this court's supervisory powers are required in order to preserve petitioner's due process rights.

2. Whether the Sixth Circuit Court of Appeals erred when it held that the issue of the Administrative Law Judge's bias was not properly before it because Petitioner did not raise the issue before the National Labor Relations Board.

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John Conlee Enterprises, Inc. respectfully petitions this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding December 8, 1997.

OPINIONS BELOW

The Judgment and Opinion of the Court of Appeals for the Sixth Circuit is not published but is reproduced at App. A, A1. The Judgment and Opinion of the Court of Appeals for the Sixth Circuit denying rehearing *en banc* is not published but is reproduced at App. B, A11. The Judgment and Opinion of the National Labor Relation Board Panel is reported at 317 N.L.R.B. 1082 and is reproduced at App. C, A13.

JURISDICTION

The judgment of the United States Court of Appeals was rendered August 28, 1997. A timely petition for Rehearing *en banc* was filed by Petitioner. Such Petition for Rehearing was denied on December 8, 1997. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment Due Process Clause:

No person shall. . . be deprived of life, liberty, or property, without due process of law.

29 U.S.C. § 160(c):

Reduction of testimony to writing; findings and orders of Board.

. . .

> Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice. . .
>
> . . .

29 U.S.C. § 160(f):

> Review of final order of Board on petition to court.
>
> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia...
>
> . . .

STATEMENT OF THE CASE

Petitioner John Conlee Enterprises, Inc. promotes, manages, and sells entertainment services provided by Mr. John Conlee, a country music singer, and his band. Petitioner is a Tennessee corporation located in Nashville, Tennessee, and Mr. Conlee performs throughout the United States. Petitioner's president is Mr. Conlee, and Mr. Steve Sechler serves as Petitioner's band leader and road manager.

William Hall, Lonnie Tate, Rex Wiseman, and Lee Ann Wiseman are musicians that were employed by Petitioner. Each are members of the American Federation of Musicians ("AFM"), Local 257, as are Conlee and Sechler. However, Petitioner has no bargaining or contractual relationship with the AFM. Upon the AFM's advice, Hall, Tate and the Wisemans filed a grievance over compensation issues against Petitioner.

After the employees filed their grievance, Conlee and Sechler discovered that all of the musicians' equipment and personal items had been removed from Conlee's touring bus. Thus, Conlee believed that the employees quit and did not intend to return to work. He then issued a letter to each employee, stating his belief that the musicians had terminated their employment based on the removal of their things from the tour bus. Hall, Tate, and the Wisemans then told Conlee that they had not intended to terminate their employment, but Conlee informed the four that he had hired permanent replacements.

On August 16, 1994, the NLRB filed an unfair labor practice charge against Petitioner, and a complaint issued on September 29, 1994. On January 11, 1995, a hearing was held before ALJ Frank H. Itkin. In his written Opinion,

Judge Itkin credited all of the Board's witnesses and discredited all of Petitioner's witnesses, and ruled that Petitioner had violated sections 8(a)(1) and (3) of the National Labor Relations Act. Petitioner filed exceptions to Judge Itkin's credibility determinations, asserting that the ALJ was biased. Nevertheless, the NLRB affirmed Judge Itkin's decision and invoked the jurisdiction of the Sixth Circuit Court of Appeals pursuant to 29 U.S.C. § 160(f). Petitioner then introduced statistical evidence indicating that from 1973 to 1995, ALJ Itkin had credited 93% of all NLRB witnesses in CA or CA/RC cases while crediting only 21% of "employer" witnesses, making the Judge 4.6 times more likely to credit a NLRB witness than an employer witness. *See* App. 28. The Sixth Circuit Court of Appeals rejected the evidence and ordered enforcement of the NLRB's decision. Petitioner then filed a Petition for Rehearing and further offered the results of a statistical regression analysis of 113 cases that clearly shows that ALJ Itkin is biased in favor of the NLRB. However, the Sixth Circuit denied the Petition for Rehearing and refused to consider this analysis, holding that the issue of ALJ Itkin's bias was not properly before it because Petitioner did not raise the issue before the NLRB.

In enforcing the ALJ's decision, the Sixth Circuit ignored the evidence of Judge Itkin's bias and in effect sanctioned a substantial departure from the accepted and usual course of judicial proceedings. Accordingly, as is more fully set forth below, this Court should grant the Petition for Certiorari.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE'S CREDIBILITY DETERMINATIONS HAVE, AS A MATTER OF LAW, SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF ADMINISTRATIVE JUDICIAL PROCEEDINGS THAT THIS COURT'S SUPERVISORY POWERS ARE REQUIRED IN ORDER TO PRESERVE PETITIONER'S DUE PROCESS RIGHTS.

The first issue before this Court involves the bias of an administrative law judge. Administrative law judges are required, as are Article III judges, to remain impartial and unbiased during all proceedings before them. *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, L.Ed. 2d 1 (1982). In fact, ALJ's are held to a higher standard of impartiality than are Article III judges. *See NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943):

> The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

Accordingly, the actions of ALJ's warrant closer scrutiny in order to prevent judicial bias.

The National Labor Relations Act authorizes the NLRB to enter an order based on unfair labor allegations after a hearing has been conducted. 29 U.S.C. §160(c). This hearing is meant to be conducted by a tribunal without

prejudice and "imbued with the desire to accord to the parties equal consideration." *Phelps*, 136 F.2d at 564. (emphasis added). If the respondent believes that the ALJ did not consider the witnesses and arguments of both parties equally, she can look to the federal courts of appeals for relief. *See* 29 U.S.C. §160(f). Further, federal courts are responsible for making certain that "the image of the administrative process is not transformed from a Rubens to a Modigliani." *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970).

In order to succeed on a claim of judicial bias, a party must "overcome a presumption of honesty and integrity" and provide evidence that a "risk of actual bias or prejudgment" is present. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975). A party may do so by demonstrating either that the judge has predetermined an issue or reasonably appears to have predetermined an issue. *Partington v. Gedan*, 880 F.2d 116, 135 (9th Cir. 1989), (Reinhardt, J. concurring and dissenting), *vacated on other grounds*, 497 U.S. 1020, 110 S.Ct. 3265, 111 L.Ed. 2d 776 (1990). The standard applied by several circuits addressing the issue is whether the facts surrounding the charge of bias would create a reasonable doubt of the judge's impartiality in the mind of a reasonable man. *See U.S. v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied* 430 U.S. 909, 97 S.Ct. 1181, L.Ed. 2d 585 (1977). *See also U.S. v. Wolfson*, 558 F.2d 59, 64 (2nd Cir. 1977); *Hepperle v. Jonhston*, 590 F.2d 609, 614 (5th Cir. 1979); *U.S. v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980). In applying this test, a judge would be disqualified even if there is no actual bias on the judge's part. *In re Cargill, Inc.*, 66 F.3d 1256, 1260 (1st Cir. 1995), *cert. denied* 116 S.Ct. 1545, 134 L.Ed. 2d 648 (1996).

Petitioner contends that the Administrative Law Judge

("ALJ") who presided over Petitioner's initial hearing was biased, thus depriving Petitioner of its Due Process rights. To prove that the ALJ, (Judge Frank Itkin) was biased, Petitioner offered significant statistical evidence demonstrating that Judge Itkin has credited an astonishingly high number of General Counsel witnesses throughout his career while crediting an equally astonishingly low percentage of employer witnesses. App. 49. Petitioner is not the first litigant to raise the issue of Judge Itkin's bias. In *Joy Recovery Technology Corp.* the employer filed exceptions to ALJ Itkin's determinations of credibility and conducted a study of his past decisions. App. 28, 50. This study analyzed 905 witnesses from 113 CA and CA/RC cases between 1973 and 1995, and found that ALJ Itkin was 4.6 times more likely to credit an NLRB witness than an employer witnesses. App. 28. ALJ Itkin credited 532 of the 572 NLRB witnesses, or 93%, testifying before him between 1973 and 1995. On the other hand, he credited only 69 of 333 employer witnesses, or 21%, between 1973 and 1995. However, the Seventh Circuit Court of Appeals disregarded the employer's evidence because in its opinion the data was compiled in an unscientific manner.

Using the *Joy Technology* numbers as a base, Petitioner conducted a more sophisticated statistical analysis of Judge Itkin's credibility determinations. Statistically, if we assume a probability of .5 in crediting witnesses, then one would expect only 286 of the 572 General Counsel witnesses to be credited. Amazingly, the actual observed number of 532 is 20.6 standard deviations from the expected number of 286, or a probability of 1 out of an unimaginable number (essentially 2 followed by 110 zeros). If we assume that the General Counsel's witnesses are credible 60% of the time, the observed number is 16.1 standard deviations from the expected number of 343. Applying an assumption of 70%

credibility, the expected number is 400 and the number of standard deviations is 12, and at 80%, the expected number is 458 and the number of standard deviations is 7.8. If we assume that the General Counsel's witnesses are credible an amazing 90% of the time, the probability of crediting 532 of 572 witnesses is still 1 out of 130, or 2.4 standard deviations from the expected norm.

In Title VII cases, this Court has held that such large statistical deviations from the expected norm are sufficiently suspect as to give rise to an inference of discrimination. *Hazelwood School District v. U.S.*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed. 2d 768 (1977) (unlawful discrimination may be suspected "if the difference between the expected value and the observed number is 'greater than two or three standard deviations.'"). Further, this Court has reached a similar conclusion with regards to unfairness in the selection of jurors. *Castenada v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed. 2d 498 (1977) (a difference of 12 standard deviations between expected and observed distributions made out a *prima facie* case of discrimination in jury selection). In this case, the difference between the observed and expected values is less than three standard deviations only if one assumes that the General Counsel's witnesses are credible 90% of the time. Even if the assumption is that the General Counsel's witnesses are credible 70% of the time, ALJ Itkin's credibility determination history is still 12 standard deviations, the same number of standard deviations found to establish a *prima facie* case of discrimination in *Castenada*. App. 49.

In *NLRB v. Joy Recovery Technology Corp.*, the Seventh Circuit Court of Appeals deferred to ALJ Itkin's credibility decisions because "the judge on the front line is in the best position to determine which. . . witnesses should be

credited." 1998 U.S. App. 1047, App. 52-53. However, Judge Itkin's credibility determinations do not warrant the usual deference due to such administrative decisions. The National Labor Relations Board correctly noted in its ruling on Petitioner's case that an ALJ's credibility findings should not be overruled unless the clear preponderance of all evidence convinces the reviewing court that the credibility findings are incorrect. *NLRB v. John Conlee Enterprises*, 317 N.L.R.B. 1082, *enforced* 1997 U.S. App. LEXIS 23176, *citing Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3rd Cir. 1951). App. 7. However, this rule is not without exception. According to the Court of Appeals for the Fourth Circuit, an ALJ's credibility findings are not entitled to this deference when such findings are set out in a generalized, conclusory manner. *Be-Lo v. NLRB*, 126 F.3d 268, 278 (4th Cir. 1997). Further, § 17450.30(1) of the NLRB's Judge's Manual reinforces this principal, stating that an ALJ should indicate "carefully and specifically how he arrived at his credibility resolutions." National Labor Relations Board, *Manual: Division of Judges* (1984). Petitioner contends that, not only did ALJ Itkin set out his credibility determinations in a "general [and] conclusory manner" in the instant case, he does so on a regular basis (particularly when discrediting employer witnesses).

Examining Judge Itkin's decisions, it is evident that he utilizes ambiguous language while establishing his credibility determinations, especially when discrediting employer witnesses. In discrediting Petitioner's witnesses, ALJ Itkin simply stated that "the testimony of Conlee, Sechler, and Roberts [Petitioner's witnesses] was at times vague, unclear, incomplete, and contradictory." 317 N.L.R.B. 1082, (App. 14). No specific examples of "incomplete" or "contradictory" testimony are actually cited, only a blanket declaration. *Id.* Judge Itkin is notorious for such generalized

rulings, having discredited employer witnesses with the same language numerous times. *See T&J Container Systems*, 316 N.L.R.B. 771 (1995), ("[t]estimony . . . was at times incomplete, unclear, vague, evasive, shifting, and contradictory."); *Wimpey Minerals U.S.A., Inc.*, 316 N.L.R.B. 803 (1995), ("I find the testimony. . . to be at times incomplete and unclear."); *I.C.C. Air Services Corp.*, 1995 N.L.R.B. 324 (1995), ("[t]he testimony. . . was at times vague, general, and unclear."); *Getman Corp.*, 1996 N.L.R.B. 180 (1996), ("[t]estimony was at times vague, incomplete, unclear, evasive, and shifting"). Petitioner asserts that the above-cited cases sufficiently demonstrate the ambiguous language ALJ Itkin utilizes while discrediting employer witnesses, and will not burden this Court further with additional examples.

When holding ALJ Itkin's credibility determinations up to the light of case law and the NLRB judicial manual, the general and conclusory nature of the Judge's credibility rulings is apparent. Accordingly, Petitioner asserts that to defer to ALJ Itkin's credibility determinations is erroneous as a matter of law.

Petitioner contends that the statistical evidence demonstrates that Judge Itkin prejudges the credibility of witnesses before hearing their testimony, or alternatively that Judge Itkin's actions would raise reasonable doubt as to his impartiality in the mind of a reasonable man. Further, Petitioner asserts that because ALJ Itkin has consistently prejudged the credibility of witnesses throughout his career, ALJ Itkin prejudged the credibility of the witnesses during Petitioner's hearing as well. Such activity is evidence of judicial bias, *Withrow, supra*, and is in violation of Petitioner's Due Process Rights.

This Court should grant the Petition in this case based upon ALJ Itkin's statistically demonstrable bias alone, because this bias deprived Petitioner of due process. However, due process in this case, and in any NLRB case before ALJ Itkin, is further compromised by Section 10060 of the NLRB's Casehandling Manual. See App. at 50. Section 10060 deals with credibility determinations by the NLRB's Regional Office at the investigation stage. This Section instructs the Region that, in cases where the Region is unable to resolve credibility and where the resolution of the conflict "*means the difference between dismissal and issuance of complaint*, a complaint should be issued." (emphasis in original) As previously demonstrated by Petitioner and by the employer in *Joy Technology*, ALJ Itkin is 4.6 times more likely to credit NLRB witnesses than the employer's witnesses, even though credibility may have been a close call in the investigation. In effect, once the NLRB files a complaint, ALJ Itkin uses a "rubberstamp" to credit witnesses whose testimony may have been questionable even to the NLRB investigators. Thus, when Section 10060 is combined with ALJ Itkin's bias in favor of NLRB witnesses, due process is almost a guaranteed "no-show" at any hearing before ALJ Itkin where an employer's alleged unfair labor practice is an issue.

One of the most important principals in the jurisprudence of a democratic society is that every person has the right to a fair trial, administered by an impartial adjudicator. The Founding Fathers of this country held dear the concept of an impartial tribunal, and accordingly guaranteed that every American would have access to such an impartial tribunal by drafting the Fifth Amendment's Due Process Clause. The Due Process Clause is the cornerstone of American jurisprudence. It guarantees a person a fair and impartial tribunal in both criminal and civil cases. "A fair

trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *see also NLRB v. Ford Motor Co.*, 114 F.2d 905, 909 (6th Cir. 1940), *cert. denied* 312 U.S. 689, 61 S.Ct. 621, 85 L.Ed. 1126 (1941). The right to an impartial adjudicator is so fundamental that "any departure from it shocks [mankind's] common sense and sentiment of justice." *NLRB v. Phelps*, 136 F.2d 562, 564 (5th Cir. 1943).

The right to an impartial judge is necessary to the American legal system for a number of reasons. An impartial tribunal helps guarantee that life, liberty, or property will not be seized based on erroneous or distorted impressions of the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980); *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, L. Ed. 2d 423 (1971). Additionally, a fair tribunal provides "both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall*, 446 U.S. at 242, *quoting Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, 71 S.Ct. 624, 95 L.Ed. 817 (1951). Accordingly, even if the record provides sufficient evidence to support the judgment, once "bias and prejudice in a judge first rears its ugly head" the judgment is tainted and cannot stand. *Phelps*, 136 F.2d at 564.

The statistical evidence is significant enough to create a reasonable doubt in the mind of a reasonable man concerning ALJ Itkin's impartiality. Petitioner thus respectfully submits that ALJ Itkin appears, even if he did not, to have predetermined the credibility of witnesses not only in Petitioner's case, but in CA and CA/RC cases generally. Predetermination or the appearance of predetermination of an issue is sufficient to prove judicial

bias. *See Gedan*, 880 F.2d at 135. Because of Judge Itkin's bias in favor of NLRB witnesses, which bias deprived Petitioner of Due Process, Petitioner requests that this Court grant this Petition and remand this case to the Sixth Circuit Court of Appeals with instructions that a new hearing be conducted before an unbiased ALJ.

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN IT HELD THAT THE ISSUE OF THE ADMINISTRATIVE LAW JUDGE'S BIAS WAS NOT PROPERLY BEFORE IT BECAUSE PETITIONER DID NOT RAISE THE ISSUE BEFORE THE NLRB.

The Sixth Circuit Court of Appeals refused to consider Petitioner's statistical evidence for two reasons. First, the Court held that the one hundred-thirteen cases contained in Petitioner's analysis were not part of the record. Second, the Court stated that the issue of bias had not been properly brought before the NLRB. *See* App. 4. Petitioner asserted in its Petition for Rehearing, and continues to assert, that the Sixth Circuit was in error. App. 20.

The Sixth Circuit's ruling was wrong for two reasons. First, the issue of ALJ Itkin's bias was brought before the NLRB on several occasions. As demonstrated in its Petition for Rehearing *En Banc*, Petitioner presented the issue of ALJ Itkin's bias to the NLRB numerous times. Statements such as, "[g]iven the undisputed evidence, it is clear that the ALJ made the 'temporary' finding only because it was his goal to reject all evidence submitted even if it were relevant and uncontroverted" (emphasis in original) and "[t]he ALJ admitted this statement (citation omitted) but as he did with most of [Petitioner]'s evidence, ignored its significance" were present in the record before this case was considered by the

Sixth Circuit Court of Appeals. App. 24. Furthermore, in its decision the NLRB itself acknowledged that Petitioner excepted to Judge Itkin's credibility determinations, but the Board refused to overrule such determinations. *See* App. 7.

Second, Petitioner had no reason to examine all of Judge Itkin's previous decisions in order to determine if the ALJ was biased until after Petitioner's Decision was already rendered. Further, collection and computation of the statistical evidence used to demonstrate ALJ Itkin's bias was a long and difficult process. So, Petitioner's first opportunity to provide the statistical evidence in its present form was at the Sixth Circuit level. Moreover, the issue of Due Process is so important, as discussed *supra,* that a party should be able to assert a violation of his or her rights under the Fifth Amendment at any time, even post judgment. This is no different than asking the Court for a new trial after discovering that the jury had been tampered with.

Petitioner contends that the Sixth Circuit Court of Appeals was in error when it refused to consider Petitioner's statistical evidence. The issue of judicial bias was raised before the NLRB, and the statistical evidence was presented at the earliest practical point. Accordingly, Petitioner requests that this Court grant the Petition, and in the event that this case is not remanded for a new hearing before an impartial ALJ, that this Court remand this case to the Sixth Circuit Court of Appeals with instructions to consider Petitioner's statistical evidence of ALJ Itkin's bias.

CONCLUSION

The right to an impartial tribunal is the foundation of a democratic society. Our system of government will not suffer the existence of a tribunal that favors one party over

another, or even appears to be impartial. To do so would violate both the Due Process Clause of the U.S. Constitution as well as the notions of fairness and justice. Judge Itkin's history of crediting 93% of NLRB witnesses credible while discrediting 79% of employer witnesses clearly indicates that he is biased in favor of the NLRB. This Court would never allow such bias on the part of a district court judge who only considered the testimony of men over women, or whites over African-Americans, in reaching decisions. Do not Employers also rest underneath the umbrella of Due Process? The obvious the answer is that they do, yet if this Court allows the decision of the Sixth Circuit to stand, Petitioner will be permanently deprived of the rights guaranteed to all citizens of the United States. Thus, Petitioner respectfully requests that this Court grant its Petition and either remand this case to the Sixth Circuit Court of Appeals with instructions that a new hearing be conducted before an unbiased ALJ, or in the event that this case is not remanded for a new hearing before an impartial ALJ, that this Court remand this case to the Sixth Circuit Court of Appeals with instructions to consider Petitioner's statistical evidence of ALJ Itkin's bias.

/s/_____
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APPENDIX A

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
JOHN CONLEE ENTERPRISES, INC.,
Respondent.

NO. 96-5691

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
1997 U.S. App. LEXIS 23176

August 28, 1997, Filed

NOTICE: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 124 F.3d 198, 1997 U.S. App. LEXIS 30724.

PRIOR HISTORY: ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD. 26-CA-16335. 7-13-95.

NLRB v. John conlee Enterprises, Inc.,
1997 U.S. App. LEXIS 23176

DISPOSITION: Order of the National Labor Relations Board ENFORCED.

COUNSEL: For NATIONAL LABOR RELATIONS BOARD, Petitioner: Aileen A. Armstrong, Dep.Asso.Gen.Counsel, Walter Meyer, Farrell Tate, National Labor Relations Board, Washington, DC.

For JOHN CONLEE ENTERPRISES, INC., Respondent: Philip K. Lyon, Jack Lyon & Jones, Nashville, TN.

JUDGES: BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges. Alice M. Batchelder, Circuit Judge, concurring in part and dissenting in part.

OPINION: PER CURIAM. Section 10(a) of the National Labor Relations Act vests the National Labor Relations Board with jurisdiction to prevent any person from engaging in any unfair labor practice affecting commerce. After employees of John Conlee Enterprises filed an unfair labor practice charge, the National Labor Relations Board issued a complaint alleging that, by threatening and subsequently firing its employees, John Conlee Enterprises engaged in conduct that violated the National Labor Relations Act. After a hearing on the issues, Administrative Law Judge Frank H. Itkin rendered a decision against John Conlee Enterprises. Upon review of the decision, a three judge panel of the National Labor Relations Board affirmed the Administrative Law Judge's rulings, findings and conclusions and adopted his recommended Order. Concluding that John Conlee Enterprises' actions violated the National Labor Relations Act, the National Labor Relations Board ordered the company to cease and desist from committing such unfair labor

practices and to post copies of an appropriate notice acknowledging the order. The order also directs John Conlee Enterprises to reinstate the musicians and to make them whole. Section 10(e) of the National Labor Relations Act gives the Board the power to petition this Court for the enforcement of its order. Section 10(e) also vests this Court with the power to enforce, to modify and enforce or to set aside in whole or in part the order of the Board. Of course, this Court must also be mindful that we must sustain the Board's findings of fact as long as they are supported by substantial evidence, even if we might have reached a different conclusion upon reviewing the matter de novo. 29 U.S.C. @ 160(e); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 493, 95 L. Ed. 456, 71 S. Ct. 456 (1950); Indiana Cal-Pro, Inc. v. N.L.R.B., 863 F.2d 1292, 1297 (6th Cir. 1988). Because there is ample evidence to sustain the Board's findings, we will enforce the order of the Board.

John Conlee Enterprises manages, promotes and sells the entertainment services of John Conlee. The company is headquartered in Nashville, Tennessee, but performs throughout the United States. John Conlee is the Company's president and Steve Sechler serves as the road manager and band leader. John Conlee Enterprises employed as musicians, William Hall, Rex Wiseman, Jean Ann Wiseman, and Lonnie Tate. The musicians are members of Local 257, American Federation of Musicians but John Conlee Enterprises does not have a bargaining or contractual relationship with that union.

During February, 1994, Hall, Tate and the Wisemans discussed their dissatisfaction with John Conlee Enterprises' policy of deducting the amount of their separately earned

funds from their weekly salary during the winter months. Specifically, when John Conlee Enterprises performed at the Grand Old Opry, John Conlee Enterprises would deduct the amount each employees received from the Opry from their paychecks as a way to equalize its expenses during a season of reduced revenue. John Conlee Enterprises would also switch employees to a day rate in an attempt to conserve funds in the winter.

Ultimately the musicians became so dissatisfied with the pay arrangement that they contacted the Union to discuss their concerns and options. Based on the Union's advice, the four decided to file a grievance with the Union despite their fear that John Conlee would retaliate by firing them. As a precautionary measure, the employees also removed equipment and items belonging to them from the bus when they returned to Nashville. Conlee and Sechler saw Hall removing equipment from the bus. Although Conlee asked if the equipment was broken, he did not regard the event as unusual, especially during the winter months. Hall told Conlee that he was cleaning the equipment.

On March 5, a few days after removing the equipment from the bus, Hall approached Sechler and informed him of the musician's intent to file a grievance. Hall also told Sechler that he was letting Sechler in on the secret because he didn't want to go along with the other musicians' plan to "blindside" Conlee. Sechler asked Hall if he was ready for the "consequences" of filing the grievance and suggested that Hall should know what Conlee would do. When Hall asked Sechler if he meant that Conlee would fire him, Sechler replied "it's pretty obvious."

On March 6, Sechler told Conlee everything about his conversation with Hall. Thereafter, Conlee inspected the bus and observed that the musicians had removed their equipment and personal items. Although Conlee testified that he assumed that the employees "didn't intend to come back," he never called any of them to verify that suspicion or to see if they intended to play at the Company's engagement the next weekend.

On March 7, Conlee received a copy of the grievance filed by the employees and, on March 8, Conlee informed all of the employees by letter that he had concluded that they had terminated their employment based on the removal of their things from the bus. Tate, Hall and Wiseman called Conlee and advised him that they had not terminated their employment. Nonetheless, Conlee refused to rescind the terminations. A future letter from Conlee advised the employees that they had been "permanently replaced." In fact, John Conlee Enterprises had hired three "per day" employees to perform over the next weekend only.

Given the posture of the corporation's appeal and these facts, we are faced with the job of deciding: (1) whether substantial evidence supports the Board's finding that John Conlee Enterprises violated @ 8(a)(1) of the National Labor Relations Act by threatening an employee with discharge because he and other employees sought the support of the Union concerning their dissatisfaction over salary matters; and (2) whether substantial evidence supports the Board's finding that John Conlee Enterprises violated @ 8(a)(1) and (3) of the National Labor Relations Act by terminating employees because they sought the support of the Union

concerning their dissatisfaction over salary matters.

Although Sechler testified that he was referring to the probability that Hall's actions would impair his personal relationship with Conlee, both Administrative Law Judge Itkin and the Board used the testimony regarding Sechler's reference to "consequences" as evidence of a threat of retaliation. This Court must accept the Board's interpretation if there is substantial evidence to support that conclusion. Hall insisted that he pushed Sechler to define "consequences." According to Hall, he asked Sechler "what do you mean, fire me?" and Sechler replied "it's pretty obvious." In light of Hall's testimony, which is a rational explanation of the events, Sechler's explanation seems flimsy at best. We therefore support the Board's finding that John Conlee Enterprises violated @ 8(a)(1) of the National Labor Relations Act by threatening an employee with discharge because he and other employees sought the support of the Union concerning their dissatisfaction over salary matters.

Despite Conlee's claims that his March 8 letter to the musicians reflected only his conclusion that the musicians had quit, both Administrative Law Judge Itkin and the Board believed that Conlee wrote the dismissal letter in reply to the grievance filed by the employees. Again, this Court must accept the Board's interpretation if there is substantial evidence to support that conclusion. The evidence before the Board revealed that Conlee received a copy of the grievance the day before he wrote the dismissal letter. The musicians also reported that even in light of Conlee's desperation for musicians for the next weekend, Conlee never contacted any of them in order to confirm his alleged conclusion that they

had quit. Instead, the evidence shows that Conlee simply contacted his attorney before he wrote the letter. Accordingly, we support the Board's finding that John Conlee Enterprises violated @ 8(a)(1) and (3) of the National Labor Relations Act by terminating employees because they sought the support of the Union concerning their dissatisfaction over salary matters.

Finally, John Conlee Enterprises uses 113 of Administrative Law Judge Itkin's prior cases to support its claim that Administrative Law Judge Itkin did not provide it with a fair and impartial tribunal. The corporation alleges that these cases produce a pattern of crediting almost all employee witnesses and disregarding employer witnesses without regard to the substance of their testimony. Even if this claim had merit, the 113 prior cases are not part of the record in this case. More importantly, this Court cannot address contentions not properly before it because John Conlee Enterprises did not raise this claim before the Board. Section 10(e) of the Act precludes appellate court review under these circumstances "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We continue to define this exception narrowly, and refuse to review this issue in order to give proper deference to the value and importance of the Board's labor relations expertise. N.L.R.B. v. Allied Products Corp., Richard Brothers Divisions, 548 F.2d 644, 653 (6th Cir. 1977).

We hereby ENFORCE the order of the National Labor Relations Board.

CONCUR BY: Alice M. Batchelder (In Part)

DISSENT BY: Alice M. Batchelder (In Part)

DISSENT: Alice M. Batchelder, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion regarding its findings pursuant to @ 8(a)(1), but finding no support for a violation of @ 8(a)(3), I respectfully dissent from that part of the majority's opinion.

The NLRA, in 29 U.S.C. @ 157, provides "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The first provision in question, 29 U.S.C. @ 158(a)(1) or @ 8(a)(1), merely makes interference with the rights articulated in 29 U.S.C. @ 157 a violation of the act. The other provision in question, 29 U.S.C. @ 158(a)(3), or @ 8(a)(3), on the other hand, does not refer back to 29 U.S.C. @ 157, but rather contains independent language regarding violations. The provision, as codified in the United States Code, reads as follows:

(a) It shall be an unfair labor practice for an employer --

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. @ 158(a)(3). As clearly articulated, @ 8(a)(3) protects only against discrimination which is intended to

"encourage or discourage membership in any labor organization."

The difference between violation of @ 8(a)(1) and @ 8(a)(3) has been recognized by the NLRB. In Roemer Indus., Inc., 205 N.L.R.B. 63, 1973 NLRB LEXIS 634, 1973 WL 5090 (1973) the employer fired two employees for walking off the job after three of their coworkers were fired. Violation of both @@ 8(a)(1) and 8(a)(3) was asserted. The ALJ, as affirmed by the Board, found a violation of @ 8(a)(1) because the employer had interfered with the employees "concerted activities." Id. at *5. The ALJ refused to find a violation of @ 8(a)(3), noting that "absent . . . any evidence of union activities" there was not "a sufficient basis . . . to prove [the employer] also violated Section 8(a)(3) of the Act by discharging or refusing to reinstate [the employees]."Id. A similar outcome was had in National Airmotive, 207 N.L.R.B. 517, 1973 NLRB LEXIS 78, 1973 WL 4639 (1973), where the ALJ initially found a violation of both @@ 8(a)(1) and 8(a)(3). The Board overturned the holding as to @ 8(a)(3), finding that the activities of the employee, while "related to the terms and conditions of employment" were not "activity on behalf of a union." Id. at * 1. These opinions are also supported by NLRB v. Washington Aluminum Co., 370 U.S. 9, 8 L. Ed. 2d 298, 82 S. Ct. 1099 (1962), and NLRB v. Fry Roofing Company, 651 F.2d 442 (6th Cir. 1981), in which allegations of interference with concerted activity under @ 8(a)(1) did not lead to accusations of a violation of @ 8(a)(3). In both cases, only @ 8(a)(1) is discussed.

In the present case, all of the parties, including John Conlee and Steve Sechler, were members of a union. But the

parties agree that the union had no bargaining agreement with respondent employer, the union had no power to act on the employees' grievance, and the employer had no obligation to respond to the grievance. Finally, there is no evidence whatsoever in the record that anything this employer did with regard to these employees was intended either to encourage or discourage union membership, or had that effect. Under these facts, it is clear that the employees' attempt to protest, while concerted activity under @ 8(a)(1), did not amount to union activity under @ 8(a)(3). There simply was no union activity here; there was no issue of union membership; there was no intention to encourage or discourage union membership on behalf of the employer. Union membership was irrelevant. The record supports no other conclusion. Therefore, while I concur with the majority's conclusion regarding violation of @ 8(a)(1), I respectfully dissent from that part of the majority opinion which finds a violation of @ 8(a)(3).

APPENDIX B

96-5691

FILED
December 8, 1997
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOHN CONLEE ENTERPRISES, INC.,
Respondent.

ORDER

BEFORE: MARTIN, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

John Conlee Enterprises, Inc. and William D. Hall Sr.
Case 26-CA-16335

NATIONAL LABOR RELATIONS BOARD

317 N.L.R.B. 1082; 1995 NLRB LEXIS 660;
149 L.R.R.M. 1280; 317 NLRB No. 156

July 13, 1995

[*1]

DECISION AND ORDER

By Margaret A. Browning, Member, Charles I. Cohen, Member, John C. Truesdale, Member.

COUNSEL:
Jane Vandeventer, Esq., for General Counsel.

Phillip K. Lyon, Esq., for Respondent.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

John Conlee Enterprises, Inc.,
317 N.L.R.B. 1082 (1995)

OPINION:

On March 24, 1993 Administrative Law Judge Frank Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, n1 and conclusions and to adopt the recommended Order.

n1 The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently omitted from his decision the factual basis of our jurisdiction in this case.

The Respondent admitted that it is a corporation with an office and place of business in Nashville, Tennessee, engaged in the business of providing entertainment services. The Respondent also admitted that during the 12-month period preceding the issuance of the complaint it derived income in excess of $ 50,000 from the sale of its services to customers located outside the State of Tennessee. Finally, the

Respondent admits that, at all material times, it has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. [*2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, John Conlee Enterprises, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. July 13, 1993

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

ALJ: FRANK H. ITKIN

ALJ-DECISION:
DECISION

FRANK H. ITKIN, Administrative law Judge. An unfair labor practice charge was filed in this proceeding on August 16 and a complaint issued on September 29, 1994. The General Counsel alleged in the complaint that Respondent Employer violated Section 8(a)(1) of the National labor Relations Act by threatening an employee with discharge because the employee had filed a grievance with the Union,

Local 257, American Federation of Musicians. The General Counsel further alleged that Respondent Employer violated Section 8(a)(1) and (3) of the Act by discharging employees William D. Hall Sr., Rex Wiseman, Jean Ann Wiseman, and Lonney Tate because they had supported the Union and engaged in protected concerted activities. The complaint was amended during and following the close [*3] of the hearing. n1 Respondent Employer denied violating the Act as alleged.

n1 The General Counsel and counsel for the Employer filed a joint motion following the close of the bearing to delete the words "/John Conlee" from the caption and pleadings filed herein because the General Counsel has withdrawn any claim that "John Conlee as an individual is a Respondent herein." (See ALJ Exh. 1.) The joint motion is granted.

A hearing was held on the issues raised on January 11, 1995, in Nashville, Tennessee. And, on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer, John Conlee Enterprises, Inc., provides entertainment services and is admittedly engaged in commerce as alleged. The Union, Local 257, American Federation of Musicians, is admittedly a labor organization as alleged. John Conlee, the Employer's president and chief operating officer, performs as a country music singer with a group of musicians. Included within this group are the four alleged discriminatees in this case. The evidence pertaining to the Employer's treatment of these four alleged discriminatees

as a consequence of their attempt [*4] to file a grievance with the Union and engage in related concerted activities, is summarized below.

William D. Hall Sr. testified that he started working for the Employer as a musician in early 1980; that he has been a member of the Union for about 15 years; and that he has worked under the Union's "Nashville Road Scale" (G.C. Exh. 2) during the past few years. Hall generally explained his and his coworker's' "pay arrangement" with the Employer, as follows:

We were salaried usually until wintertime and then we would be approached with going possibly to a day rate . . . During the winter . . . we would work the Grand Old Opry and [the Employer] would deduct that from our salary. Then, as work got worse . . . [the Employer] would put us on a day rate.

Hall noted that the "day rate" was related to the Union's "Nashville Road Scale."

Hall recalled that during February 1994, he and his co-workers, Rex Wiseman, Jean Ann Wiseman, and Lonney Tate, had discussed among themselves the Employer's "pay method."

We had talked amongst each other and felt that it was unfair. And so therefore we went to the Union, or actually made phone calls to the Union, to discuss whether this was fair [*5] or unfair . . . we were confused. . . . [The Union] informed us that it was unfair, but before they could do anything we would have to come in as a unit and file a grievance against [the Employer] and then they would take it

before the board and make their decision.

Hall and his coworkers "decided to file a grievance as the Union had advised." General Counsel Exhibit 3 is a copy of the "grievance" signed by employees Hall, Rex and Jean Ann Wiseman, and Tate on March 4, 1994, stating:

Sections violated: Article XIII, Section 2, Local 257 Nashville Road Scale.

We the undersigned attest that member John Conlee violated the above named sections of the labor agreement. John Conlee routinely, over the course of several years, deducted Opry pay from the weekly salaries of the grievants. John Conlee also changed the pay plan of the grievants over the course of several years from guaranteed salary to day rate, without timely notice, in violation of the labor agreement.

On the following day, March 5, as Hall further testified, Hall had the following conversation with the Employer's road manager and band leader, Steve Sechler,

I [Hall] said . . . Steve . . . we've gotten together and [*6] we're going to file a grievance with the Union against John [Conlee] over deducting our Opry pay and putting us on a daily rate at will. He [Sechler] looked at me and said, well, are you prepared to take the consequences. . . . I said, what do you mean, fire me. . . . He said, well, it's pretty obvious.

Hall noted that the above "grievance" was in fact filed with the Union on March 7, and it was stipulated that the Employer's business manager, David Roberts, "picked up" a

copy of the grievance from the Union on March 7. (See Tr. 21 to 22.) n2

n2 The Employer also "picked up" a "redrafted" copy of the "grievance" from the Union on March 13. (See Tr. 23 and G.C. Exh. 4.)

Thereafter, on or about March 9, employee Lonney Tate telephoned Hall apprising Hall that Tate had received a "letter" from the Employer stating, in effect, that the Employer "was sorry to hear of our departure," "wished us luck," and "hated that our relationship had to end this way." (See G.C. Exh. 8.) Hall then instructed Tate that "that's not true," "you should call Mr. Conlee and tell him the truth," "we didn't . . . quit." Hall thereafter also received a copy of the above "letter." n3 In addition, on [*7] the following day, March 10, there was a "message" on Hall's telephone answering machine from both Company President Conlee and Business Manager Roberts stating:

I [Hall] had been terminated and replaced by other musicians . . . they [the Employer] no longer needed my services . . . I could file for unemployment.

Hall promptly telephoned Conlee and apprised him that "I [Hall] didn't know what Steve had told him, but I had not quit or anything like that." Conlee, in response, then claimed that "he didn't know what was going on."

n3 This "letter" from Company President Conlee, dated March 8 (G.C. Exhs. 6, 8, and 11), was sent to Hall, the Wisemans, and Tate, and recites:

I [Conlee] was surprised to hear of your departure from Steve Sechler. Steve reported to me that sometime in the last week you removed all of your personal belongings from the [Employer's tour] bus as well as cleaned out your locker. He also indicated that all of your equipment had been removed. He further reported that bus keys were returned and were left hanging on the rack. Just to satisfy my own mind I also checked the bus and found Steve's report to be accurate.

Given the fact that never before have you cleaned out your locker, taken all of your equipment, etc., it is obvious that you have terminated your relationship with me. I am sorry you have chosen to leave but I thank you for your help over the years and I wish you the best of luck . . . . [*8]

Hall, the Wisemans, and Tate subsequently received the following letter, dated March 10, from Company President Conlee (G.C. Exh. 5):

After receiving my [Conlee's] letter of March 8, Lonney Tate called to find out his status. I thought the rest of you would have many of the same questions so I am trying to notify all of you by phone and this letter.

Based on the facts described in my March 8 letter [quoted in fn. 3, above], I needed to be sure that I would have a band so all of you have been permanently replaced. Lonney Tate asked about the status of my jobs this weekend and this notice will let you know that you will not be on the list for these jobs and other musicians will be taking your place.

After serious thought I have decided if you file for unemployment benefits not to contest it without regard to my right to do so.

Hall, on March 14, notified Company President Conlee in writing (G.C. Exh. 7):

Thank you for taking time to talk with me on the phone on . . . March 10. I did not receive your letter dated March 8 . . . until March 12 . . . . You said in the letter you were surprised to hear of my departure from Steve Sechler. I am sure that I was equally surprised since [*9] at no time did I verbally or in written form give any indication that I desired to terminate our working relationship.

Hall further testified with respect to Conlee's claim that Hall and his coworkers had "terminated" their employment because, inter alia, they had removed all of [their] personal belongings from the [Employer's tour] bus" and items contained in their "locker." (See G.C. Exhs. 6, 8 and 11.) Hall explained:

[We] came in . . . the afternoon of February 27 . . . prior to filing the grievance . . . . Steve [Sechler] was getting in his car and he saw everybody unloading their equipment. I think he turned around and said, what's going on. And, I said, well, we're taking the equipment home and [get] it all cleaned up and repaired.

Hall noted that "there had been other times other than this two week hiatus that [they] had taken equipment out of the bus" in order to do "jobs for other employers" or "to do some

repairs." Hall added that he did not tell Company President Conlee that "he had quit working for him" or "imply by taking [his] equipment that [he] had quit." Indeed, "after [he] took [his] equipment out of the [Employer's tour] bus" during late February, he [*10] worked for the Employer at the Grand Old Opry on March 4 and 5, 1994. n4

n4 On cross-examination, Hall acknowledged that the Employer is not a signatory to any collective-bargaining agreement with the Union and has "never signed the [Union's] Nashville Road Scale" agreement. Hall believed that "the Nashville Road Scale of Local 257 [agreement] has provisions in it for non-signatory employers to use musicians that are members of the Union." Hall also noted that Conlee and Sechler are members of the Union. In addition, Hall acknowledged that during late February,

We knew we were going to file the grievance. We were in fear of being fired . . . . So, we all knew that we had the two week time period that nothing . . . was going on. And so we pretty much told each other . . . we should go ahead and just spring clean and if he fires us then we'll not have to make another trip out here to come and get our equipment off the bus. Of course, we were taking some equipment anyway because we had . . . a job that weekend.

The testimony of Lonney Tate (Tr. 52 to 62), Rex Wiseman (Tr. 63 to 72), and Jean Ann Wiseman (Tr. 73 to 79) essentially corroborates the above-recited testimony [*11] of Hall. Thus, Tate testified that he has been employed as a musician by Respondent Employer for some 3 years and has been a member of the Union for about 6 years. Tate

explained that he and his coworkers were advised by the Union that they should file a "grievance" with respect to their complaint about their wages. Tate later received Company President Conlee's March 8 letter (G.C. Exh. 8) and promptly telephoned Conlee to deny, inter alia, that he had "told Steve or anybody else in the organization that [he] had quit or resigned from [his] position." Tate asked Conlee "maybe three times, are you firing me," and "he would never definitely say yes or no." Tate apprised Conlee,

> if I [Tate] did not have something in writing by Friday afternoon . . . I would be there to work the Grand Old Opry Friday evening and leave to go to Sikeston, Missouri for the [scheduled] dates on the . . . 12th and 13th . . . . He [Conlee] told me that there was no need in doing that, that he would send me something . . . that would take care of that. [See G.C. Exh. 9.]

And, Rex Wiseman similarly testified that he has been employed as a musician by Respondent Employer and a member of the Union for about [*12] 9 years. He and his wife Jean Ann Wiseman received Company President Conlee's March 8 letter and immediately prepared a written "response" disputing Conlee's assertions that they in effect had resigned or quit their employment. (See G.C. Exh. 12.) He also telephoned Conlee and similarly apprised Conlee that he "hadn't quit." He asked Conlee whether he was "fired," and Conlee responded that there would be "another phone call and letter that should clear that up." (See G.C. Exh. 5.)

Company President John Conlee testified that he is a member of the Union but is not a signatory to its

collective-bargaining agreement; he has never "attempted to pay scale or in any other manner comply with the Union contract"; and he is unaware of "any grievance procedures that are applicable" to his business. Conlee claimed that on March 6, 1994, his Road Manager Steve Sechler informed him: "I think we have a problem." Sechler then related to Conlee "his conversation with Willie Hall following the Opry the night before" pertaining to the "grievance" to be filed by the employees. Hall had told Sechler on the previous evening that Hall and his three coworkers "had signed a grievance and were going to file [*13] it with the Union," and Sechler had then asked Hall, "if they were ready for the consequences of that." Sechler also related to Conlee:

> I [Sechler] just popped up on the [tour] bus just to look around. . . . All the closets are clear, all the bedding is gone . . . [and] I can't find a piece of anything that belongs to any of [the employees] on the [tour] bus.

Conlee next claimed that, after hearing this, he was in "shock" and "stunned." Conlee checked the tour bus and "it did appear to me that the bus had been cleared and I really didn't think that anybody was coming back." Conlee instructed his Business Manager David Roberts "to call counsel to see where we stood as far as the legalities of the coming weekend contracts." Further, Conlee claimed that he also had heard a rumor that the "John Conlee band was disbanded." Conlee testified:

> I had by now concluded that these people were not coming back and so I instructed Steve Sechler to start looking for replacements.

Conlee admittedly had made no effort to "call the employees to see if they were going to show up" for his scheduled engagements.

Instead, on March 8, Conlee wrote employees Hall, the Wisemans and Tate (see G.C. [*14] Exhs. 6, 8 and 11) that "it is obvious that you have terminated your relationship with me." Shortly thereafter, Tate telephoned Conlee and stated that "he hadn't quit," and Conlee responded that "you've been permanently replaced." Rex Wiseman similarly had telephoned "to say that he hadn't quit or they hadn't quit." Conlee added:

In the early conversation with Tate, he [Tate] indicated that he'd be showing up [for their scheduled performances] unless he got clarification of his status. So, thus, the second letter was sent followed up with a phone call.

Manager Steve Sechler testified that about February 26 or 27, 1994, he had observed employee Hall unloading "his amp" from the tour bus. Hall then told Sechler that he, Hall, "was going to clean it up." Sechler noted that Hall and the other employees thereafter worked the Grand Old Opry performance on March 5. After that show, Hall told Sechler about the "grievance," Hall said, "it . . . wasn't fair the way we'd been taking [out] the Opry money." Sechler admittedly replied, "Have you thought about or are you prepared for the consequences." Sechler reported this information to Conlee the following day, March 6. He also reported that [*15] "everything was essentially gone" from the tour bus.

Sechler next testified:

> Before lunch the next day I [Sechler] received a call from John [Conlee] . . . and his words [were] . . . all the circumstances point towards a band walkout and we're going to need band members to fulfill our next weekend. Go ahead and start trying to find people.

Sechler assertedly also heard a rumor that "John [Conlee] doesn't have a band anymore" and he reported this rumor to Conlee.

Sechler acknowledged that Hall, during his conversation with Sechler about the "grievance" on March 5, "never mentioned not continuing to work for John Conlee" and "didn't say anything to indicate that he and the others were quitting." Sechler also acknowledged that Conlee had not instructed him "to ask any of the employees why they had taken their equipment home." In addition, Sechler acknowledged stating in his prehearing affidavit that on March 7 he had been asked by Conlee "to secure replacements"; "by that evening I had replacements for that weekend"; "they were not permanent replacements . . . they were per day employees."

David Roberts, the Employer's business manager, testified that the Employer is not a signatory [*16] to the Union's contract and there was no agreement with the Union over wages and related terms and conditions of employment. He recalled Company President Conlee telephoning him to say, "there's been a grievance filed with the Union" and "I [Conlee] don't think we have a band." Roberts was "asked"

to "check with the Union on the grievance." Roberts thereafter "picked up the grievance, informed Conlee about the contents of the "grievance," and was told "we'd better be checking with our counsel." Roberts thereafter participated in the preparation of the various communications to the employees discussed above. Roberts acknowledged that only three "replacements" were "hired for the weekend." Roberts also acknowledged that "at the time of [his] discussions with Conlee about what to do on the 7th and the 8th there was nothing said about contacting the employees, the band members, to find out what their intent was."

I credit the testimony of employees Hall, Tate, and Rex and Jean Ann Wiseman as summarized above. Their testimony was in large part mutually corroborative, by uncontroverted documentary evidence, and substantiated by admissions of Respondent's witnesses. And, they impressed me [*17] as trustworthy and reliable witnesses. On the other hand, the testimony of Conlee, Sechler, and Roberts was at times vague, unclear, incomplete, and contradictory. Conlee, Sechler, and Roberts did not impress me as reliable witnesses. Accordingly, insofar as the testimony of Hall, Tate, and the Wisemans conflicts with the testimony of Conlee, Sechler, and Roberts, I am persuaded here that the testimony of the former witnesses represents a more complete and reliable account of the pertinent sequence of events.

Discussion

Section 7 of the National Labor Relations Act guarantees employees the "right to self-organization, to form, join or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of" their Section 7 rights. The "test" of "interference, restraint and coercion under Section 8(a)(1) of the Act does not turn [*18] on the employer's motive or on whether the coercion succeeded or failed . . . the test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See NLRB v. Illinois Tool Works, 153 F.2d 811, 814 (7th Cir. 1946). And, Section 8(a)(3) of the Act, in turn, forbids employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Further, as restated in Peter Vitalie Co., 313 NLRB 971, 975 (1994),

When employees join to present a grievance concerning wages, hours or working conditions to their employer, their action is concerted. . . . Unless the concerted action is shown to have been conducted in an abusive manner, it is protected under Section 7 of the Act. . . . The employer must have known, or believed, that the action was part of group action or on behalf of a group of employees. . . . When such protected concerted activity is a moving reason for an employer's discipline imposed on an employee, then that adverse action violates Section 8(a)(1) of the Act, unless the [*19] employer . . . demonstrates that it would have taken

the same action notwithstanding the protected activity. [Citations omitted.]

And, an employer runs afoul of Sections 8(a)(1) and (3) of the Act by discriminatorily discharging employees "for filing grievances" with a union and "telling [an employee] that he was discharged for filing a grievance." See Black Magic Resources, 312 NLRB 667 (1993).

In the instant case, employees Hall, Tate, and Rex and Jean Ann Wiseman, members of the Union, discussed among themselves their Employer's "pay arrangement." They felt that this "pay arrangement" was "unfair." They then sought the Union's assistance and were advised to file a "grievance." They signed such a "grievance" on March 4, 1994. On the following day, March 5, employee Hall informed Manager Sechler that the employees have "gotten together" and are "going to file a grievance with the Union" protesting the Employer's "pay arrangement." Sechler coercively stated to Hall: "Are you prepared to take the consequences," that is, being fired by the Employer. They nevertheless filed their "grievance" on March 7. The Employer received a copy of the "grievance on that same day and, as Company [*20] President Conlee acknowledged, was "shock[ed]" and "stunned." On the following day, March 8, the Employer summarily fired the employees.

The Employer claimed in his March 8 letter to the employees that "it is obvious that you have terminated your relationship with me." As the credible evidence of record shows, the employees had not "terminated" their employment and they repeatedly had so advised the Employer both orally

and in writing. The Employer nevertheless insisted that they had "terminated" their employment and had been, according to Conlee, "permanently replaced." Elsewhere, Manager Roberts acknowledged that only three "replacements" were "hired for the weekend" and Manager Sechler acknowledged that they were not "permanent replacements." Indeed, the Employer, in summarily concluding that the employees had "terminated" their employment, had made no effort to contact the employees and verify that this in fact was the case.

I find and conclude that the Employer, angered and annoyed because his employees had sought union assistance and filed a "grievance" protesting "unfair" wages, retaliated against the employees by discharging them, in violation of Section 8(a)(1) and (3) of [*21] the Act. I reject as incredible and pretextual the Employer's claim that these employees had in fact led the Employer to believe that they had quit. The credible evidence of record does not support this and related assertions advanced in justification of the Employer's plainly coercive and discriminatory conduct. Moreover, although it is true that the Employer in fact had no contractual relationship with the Union, the employees, relying on advice from the Union, were acting reasonably and in good faith when they filed with the Union their "grievance" protesting their "unfair" wages. In short, this record does not support any claim that the employees were resorting to unprotected conduct in support of their complaints over their wages. Further, I find and conclude that Manager Sechler's admonition to employee Hall, as quoted above, was clearly a threat of retaliation for engaging in Union and protected concerted activity, in violation of Section 8(a)(1) of the Act. In this case, it was a threat made good.

CONCLUSIONS OF LAW

1. Respondent Employer is engaged in commerce and the Union is a labor organization as alleged.

2. Respondent Employer violated Section 8(a)(1) of the Act by threatening [*22] an employee with discharge because the employee had filed a grievance with the Union.

3. Respondent Employer violated Section 8(a)(1) and (3) of the Act by discharging employees William D. Hall Sr., Rex Wiseman, Jean Ann Wiseman, and Lonney Tate because they nad supported the Union and engaged in protected concerted activities.

4. The unfair labor practices found above affect commerce as alleged.

THE REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct or in like and related conduct and to post the attached notice. Affirmatively, Respondent Employer will be directed to offer the discriminatorily discharged employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987). Respondent Employer will also be directed to

preserve and make available to the Board or its agents on request all payroll records [*23] and reports and all other records necessary to determine backpay and compliance under the terms of this decision. And, Respondent Employer will be directed to remove from its files any references to the above discriminatory discharges and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them, in accordance with Sterling Sugars, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended n5

n5 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent Employer, John Conlee Enterprises, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening an employee with discharge because the employee had filed a grievance with the Union, Local 257, American Federation of Musicians.

(b) Discriminatorily [*24] discharging employees because they supported the Union and engaged in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Offer employees William D. Hall Sr., Rex Wiseman, Jean Ann Wiseman, and Lonney Tate immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges of employees William D. Hall Sr., Rex Wiseman, Jean Ann Wiseman, and Lonney Tate and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze

the amount of backpay due under the terms of this Order.

(d) Post at its facility copies of the attached notice marked "Appendix." n6 Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

n6 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in [*26] writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C., March 24, 1995.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

John Conlee Enterprises, Inc.,
317 N.L.R.B. 1082 (1995)

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge because they have filed a grievance with the Union, Local 257, American Federation of Musicians.

WE WILL NOT discriminatorily discharge our employees because they have supported the Union and engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer employees William D. Hall Sr.,

[*27] Rex Wiseman, Jean Ann Wiseman, and Lonney Tate immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the unlawful discharges of employees William D. Hall Sr., Rex Wiseman, Jean Ann Wiseman, and Lonney Tate and notify the discriminatees in writing that this has been done and that evidence of these discriminatory actions will not be used as a basis for future personnel action against them.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

JOHN CONLEE ENTERPRISES, INC.

APPENDIX D

CASE NO. 96-5691

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOHN CONLEE ENTERPRISES, INC.,
Respondent

PETITION OF RESPONDENT
FOR REHEARING WITH SUGGESTION
FOR REHEARING *EN BANC*

PHILIP K. LYON
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Attorney for Respondent
John Conlee Enterprises, Inc.

REQUIRED STATEMENT FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance regarding a litigant's right, pursuant to the United States Constitution as well as the National Labor Relations Act and the general principles governing our entire system of jurisprudence, to a fair and impartial hearing before a judge who is not predisposed to favor one side over the other.

_____

Philip K. Lyon
Attorney for Respondent
John Conlee Enterprises, Inc.

RESPONDENT'S PETITION FOR REHEARING

John Conlee Enterprises, Inc. respectfully petitions the Court for a rehearing under Fed. R. App. P. 40 on the issue of whether it received a fair hearing before an unbiased Administrative Law Judge of the National Labor Relations Board. Respondent believes that this Court committed a grievous error of law as more fully discussed in the following Argument. Respondent further suggests the appropriateness of a rehearing *en banc* pursuant to Fed. R. App. P. 35 on the issue involved in this Petition.

Respectfully submitted,

/s/_____
Philip K. Lyon
Counsel for John Conlee Enterprises, Inc.

ARGUMENT

The issue involved in the Petition For Rehearing with Suggestion for Rehearing *En Banc* is neither complicated nor difficult. However, it is just as important as it is non-complicated and just as significant as it is non-difficult. While Respondent disagrees with the overall findings of the three-judge panel, NLRB v. John Conlee Enterprises, Inc., Case No. 96-5691, (August 28, 1997) it has concluded that the issue raised here alone satisfies the requirements of Fed. R. App. P. 35 and 40, as well as Sixth Circuit Local Rule 14. A copy of the Slip Opinion is attached hereto as Addendum RH-1 for the Court's convenience.

The paramount issue here is whether Respondent received a fair and impartial hearing before the NLRB Administrative Law Judge (ALJ). The three-judge panel held that the issue was not properly before the Court and even if it were, the argument lacked merit. Slip Opinion at p.6. Respondent respectfully submits that the three judge panel was wrong on both counts.

Surely the principle that a litigant is entitled to a fair hearing before an impartial judge is so axiomatic that no citation of authority is needed nor is it necessary to raise the issue in graphic detail. Section 10(e) of the National Labor Relations Act requires an issue to have been raised before the NLRB in order for an appellate court to be able to review the contention, but there is also an exception to this rule. The failure or neglect shall be excused because of extraordinary circumstances. See p.6 of the Slip Opinion. Certainly extraordinary circumstances exist in this case even if the issue

was not raised below, which point Respondent disputes.

Respondent submits that the issue was clearly raised below and would direct the Court's attention to pp. 2-3 of its Reply Brief filed on November 25, 1996. In an effort to avoid redundancy, those arguments are not repeated here. However, Respondent would also direct the Court's attention to its Brief in Support of Exceptions to Administrative Law Judge's Decision found at pp. 21-33 of the Joint Appendix filed herein on December 2, 1996. More specifically, we would ask the Court to review Joint Appendix p.27 where it states, "Given the undisputed evidence, it is clear that the ALJ made the "temporary" finding only because it was his goal to reject all evidence submitted even if it were relevant and uncontroverted." (emphasis in the original) and p. 28 where it states, "The ALJ admitted this statement (citation omitted) but as he did with most of Respondent's evidence, ignored its significance." Respondent contends that these quotes along with the previously quoted language (Reply Brief p.2) clearly reflect that this issue was sufficiently raised before the NLRB to satisfy the requirements of § 10(e) of the NLRA. As stated in the Reply Brief (p. 2) "Conlee Enterprises raised the issue of ALJ Itkin's bias before the Board and further stated that his decision was an obviously one-sided Opinion where he credited 100% of the evidence submitted by the Charging Parties and either discredited or ignored Respondent's evidence. (Brief in Support of Exceptions to Administrative Law Judge's Decision, 05/18/95)" (quotes and citations in the original). It certainly should have been clear to the NLRB that Respondent was claiming that it did not get a fair hearing before ALJ Itkin. The NLRB rejected this contention just as it did Respondent's other claims in a pro-forma Decision and

Order which probably took five minutes to prepare and takes only thirty seconds to read. Joint Appendix p.12. Further, when this very issue was graphically raised concerning the identical ALJ, the NLRB dismissed it in a single footnote as totally unfounded. Joy Recovery Technology Corp., 320 NLRB No. 45 FN. 2 (12/20/95). A copy of this Decision and Order is attached hereto as Addendum RH-2 for the Court's convenience. Therefore, the issue was raised before the NLRB below, but even if it was not clearly raised, the failure is insignificant given the NLRB's cavalier attitude towards claims of ALJ bias. Finally, such an issue should be capable of being raised at the earliest practical point, which it was in this case. Certainly counsel for Respondent is not required to "check out" the ALJ in each case before his/her Decision is rendered to determine if there appears to be bias. If this is the rule, then one would suspect that the NLRB process is unconstitutional in application. Such just cannot be the law in a free society as is ours. (For further argument on this point, see Respondent's Reply Brief pp. 2-9).

Moving to the merits of our claim of bias, the statistics presented reflect overwhelming evidence of bias. The three judge panel found that the statistical analysis did not place the issue before the Court, but they were mistaken. The analysis attached as Addendum R-1 to Respondent's Brief filed September 30, 1996 (pp.1-22 of R-1) was prepared 100% from public records and published NLRB Decisions and constituted simply a citation, discussion and analysis of NLRB cases. Certainly this approach is neither novel nor unusual. (See also Respondent's Reply Brief pp. 2-3).

The statistical analysis itself is incredible and almost

unbelievable. If such numbers were found to exist in a class action Title VII case, the EEOC would be looking to see if there were some way it could impose criminal liability upon the employer. As stated above, the identical issue involving the same ALJ was involved in Joy Recovery Technology Corp. and is currently pending before the Seventh Circuit in NLRB v. Joy Recovery Technology Corp., Case No. 97-2001. While our Brief only discussed the statistical results based on a 50-50 assumption (see Brief, pp. 8-9 and Addendum R-2) the results are no less staggering when you refine the analysis to include assumptions of 60-40, 70-30, 80-20 and even 90-10. In each instance, the familiar 2-3 standard deviations standard from Hazelwood School District v. United States, 433 U.S. 299, 309 n.14 (1977) is met. If this standard requires that unlawful discrimination be suspected in the employment setting, how in the world can you ignore the suspicion of bias when an ALJ is involved? For the Court's convenience, a statistical analysis for each of the above assumptions is attached as Addendum RH-3.

In conclusion, Addendum R-1 and R-2 to Respondent's Brief, included in the Record, is a study of 113 of ALJ Itkin's CA and CA/RC opinions issued between 1973 and 1995. Of the witnesses who testified in those proceedings, 532 of 572 (93%) General Counsel's witnesses were credited. Statistically, if we assume a probability of .5 in crediting witnesses, then one would expect only 286 of 572 General Counsel's witnesses would be credited. The observed number of 532 is 20.6 standard deviations from the expected number, or a probability of 1 out of an incomprehensible number (2 followed by 110 zeros). If we assume a probability of .6 (that is an expectation that General

Counsel's witnesses are going to be telling the truth 60% of the time) the observed number is 16.1 standard deviations from the expected number. At .7, the number of standard deviations is 12, and at .8, the number of standard deviations is 7.8. At a probability expectation of .9 the probability of crediting 532 of 572 witnesses is still 1 out of 130 or 2.4 standard deviations from the expected norm. Addendum RH-3 to this Petition for Rehearing details these findings.

In civil rights cases, the Supreme Court has held that differences this large are sufficiently suspect as to give rise to an inference of discrimination. See, e.g., Castenada v. Partida, 430 U. S. 482 (1977) (a difference of 12 standard deviations between expected and observed distributions made out a prima facie case of discrimination in jury selection), and Hazelwood School District v. United States, 433 U.S. 299, 309 n.14 (1977) (unlawful discrimination may be suspected "if the difference between the expected value and the observed number is 'greater than two or three standard deviations'"). In this case, the difference between observed and expected values is less than three standard deviations only if one assumes that the General Counsel's witnesses tell the truth 90% of the time and the Respondent's witnesses almost always lie. Even if the assumption is that the General Counsel's witnesses tell the truth 70% of the time, the ALJ's credibility determination history still shows a difference of 12 standard deviations, the same number of standard deviations found to establish a prima facie case of discrimination in Castenada.

While these statistics may not, in and of themselves, prove bias, see, e.g., Fieldcrest Cannon, Inc. v. NLRB, 97

F.3d 65, 69 (4th Cir. 1996), they render the ALJ's credibility determinations suspect and thus not entitled to the usual deference.

In this case Respondent submits that this Court should review this case *en banc* and thereafter reverse the three judge panel's decision and deny enforcement to the NLRB's Order. In the alternative, the matter should be remanded to the NLRB and a new hearing ordered before a fair and impartial Administrative Law Judge. However, if this Court thinks it appropriate, it might also remand the issue of Judge Itkins' impartiality to the NLRB for a full analysis, which the NLRB has refused to conduct to date. Any other result will trample upon Respondent's right to due process of law. Further, any other result will leave an intolerable taint upon our system of jurisprudence and undermine public confidence in our system of justice.

Respectfully submitted,

JOHN CONLEE ENTERPRISES, INC.

By:_____

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Counsel for John Conlee Enterprises, Inc.

STUDY OF ALJ ITKIN'S WITNESS CREDIBILITY EVALUATIONS, 1973 - 1995

The attached analysis of ALJ Itkin's witness credibility evaluations was conducted by Daniel V. Kinsella and Donald W. Anderson, Burditt & Radzius, Chartered, 333 West Wacker Drive, Suite 2600, Chicago, Illinois 60606. Mr. Kinsella and Mr. Anderson analyzed 113 of ALJ Itkin's CA and CA/RC opinions between 1973 and 1995.

The cases in the attached table were selected by searching the Lexis® database for all NLRB decisions by ALJ Itkin, then eliminating duplicate Board decisions and all cases other than CA or CA/RC. Only CA or CA/RC decisions were analyzed in order to limit the study to reasonably analogous factual situations. The time period covered by the analysis reflects the time period covered by the database at the time this analysis was conducted.

Best efforts were used to include all relevant decisions located by the search. However, no representations or guarantees are made other than that best efforts were used in performing this analysis. In cases where a witness was credited in one part of the decision, but not credited in another, the witness was credited for purposes of this analysis.

905 witnesses from 113 cases were analyzed. In each case, the names of the witness, their affiliation to the parties, and whether the witness was credited is noted in the table. Out of 905 witnesses, 93% (532/572) of the NLRB witnesses were

credited, while 21% (69/333) of the employers witnesses were credited. ALJ Itkin is thus 4.6 times more likely to credit NLRB witnesses than employer witnesses.

APPENDIX E

TABLE OF ADMINISTRATIVE LAW JUDGE ITKIN WITNESS CREDIBILITY EVALUATIONS, 1973 - 1995

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
1. John Conlee Enterprises **[No. 317 NLRB No. 156]**	Hall	E	X	
	Wiseman, R	E	X	
	Wiseman, JA	E	X	
	Tate	E	X	
	Conlee	C		X
	Sechler	C		X
	Roberts	C	X	
2. Park Manor Nursing Home, Inc. **[1995 NLRB Lexis 557]**	Singleton	E	X	
	Schuster	E	X	
	Hall	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Handwerger	C		X
3. Golden Eagle Spotting Co. **[1995 NLRB Lexis 526]**	Scott	E	X	
	Torti	E	X	
	Riddle	E	X	
	Diekemper	E	X	
	Link	E	X	
	O'Laughlin	E	X	
	McGlynn	E	X	
	Riesenbeck	C		X
	Smelcer	C		X
	Elliot	C		X
4. McCormick Dray Lines, Inc. **[317 NLRB No. 23]**	Deivert	E	X	
	Scott	E	X	
	Montgomery	E	X	
	Chilson	E	X	
	Webb	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
5. ICC Air Services Corp. **[1995 NLRB Lexis 324]**	Shampine	E	X	
	Hartman	C		X
	Newgent	C		X
6. Wimpey Minerals USA, Inc. **[316 NLRB No. 132]**	Paine	E	X	
	Wanamker	E	X	
	Tunini	E	X	
	Weinzieri	E	X	
	Furlong	C		X
7. T&J Container Systems, Inc. **[316 NLRB No. 120]**	Dorgan	E	X	
	Cruso	E	X	
	Zawado-wicz	E	X	
	Kelling	E	X	
	Melvin	E	X	
	Manco	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Dorgan	C		X
	Scanlan	C		X
	Pedroso	C		X
8. The Lane Construc-tion Co., et al **[1993 NLRB Lexis 871]**	Davenport	E	X	
	Jenkins	E	X	
	Traylor	E	X	
	Hall	E	X	
	Rogers	E	X	
	L'Heureux	E	X	
	Burdette	C		X
	White, J	C		X
	White, K	C		X
	Givens	C		X
	Belcher	C		X
*9. Dyrotech Industries, Inc. **[1993 NLRB Lexis 1040]**	Smart	C	X	
	Carter	C	X	
	Warner	C	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Montgo-mery	C	X	
	Allen	C	X	
	Price	C	X	
	Wilson	C	X	
	Simpson	E	X	
	Parrish	C	X	
	Merriman	E		X
	McGraw	E		X
	Pack	E		X
10. George V. Lynett, et al. **[1994 NLRB Lexis 234]**	Tucker	E	X	
	Gallagher	E	X	
	Marion	C		X
11. U.S. Service Industries, Inc. **[1995 NLRB Lexis 114]**	Campos	E	X	
	Flores	E	X	
	Hernandez	E	X	
	Diaz, M	E	X	
	Saravia	E	X	
	Treminio	E	X	
	Barrero	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Ipanaque	E	X	
	Canales	E	X	
	Sorto	E	X	
	Bolanos	E	X	
	Mejia	E	X	
	Carranza	E	X	
	Diaz, R	E	X	
	Hohenstein	E	X	
	Donner	E	X	
	Epstein	C		X
	Felrice	C		X
	Gallaher	C		X
	Amstutz	C		X
	Arroyo	C		X
	Garcia	C		X
	Lopez, R	C		X
	Hancock	C		X
	Becerra	C		X
	Marius	C		X
	Mendez	C		X
	Lopez, J	C		X
	Ayala	C		X
12. BJ's Wholesale Club **[1994 NLRB Lexis 927]**	LaTorre	E	X	
	Cavaliere	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Norris	C	X	
13. Brother Industries, Inc. **[314 NLRB No. 198]**	Ham	E	X	
	Nash	E	X	
	Carlisle	E	X	
	Booker	E	X	
	Harkness	E	X	
	Mitchell	E	X	
	Melton	E	X	
	Gilley	C		X
	Matsumoto	C		X
	O'Donnell	C		X
	Pannell	C		X
	Ingle	C		X
	Jacobson	C		X
	Neal	C		X
	Burchett	C		X
	Morris	C		X
	Swords	C		X
	Farley	C		X
	Sowell	C		X
	Botkin	C		X
	Quinton	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
14. Pollution Control Industries of Indiana, et al. **[316 NLRB No. 85]**	Markusic	E	X	
	Peterson	E	X	
	Aldaz	E	X	
	Cadena	E	X	
	Henderson	E	X	
	Brooks	E		X
	Prunski	C		X
	Campbell	C		X
	Newell	C		X
	Blanken-ship	C		X
	Johnny	C	X	
15. Alumni Hotel Corp. **[311 NLRB No. 83]**	Presley	E	X	
	Crawford	E	X	
	Reed	E	X	
	Adam	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
16. Bardaville Electric, Inc. **[309 NLRB No. 43]**	Fashbaugh	E	X	
	Weber	E	X	
	Bardaville	C		X
17. New England Telephone **[309 NLRB No. 85]**	Howell	E	X	
	Farina	E	X	
	Deleva	C		X
18. Liquid Carriers Corp. **[1993 NLRB Lexis 441]**	Cardillo	C	X	
	Pentima	C	X	
	Cornette	E		X
19. Assoc. of D.C. Liquor **[300 NLRB No. 27]**	Ross	E	X	
	Head	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
20. Cannon Boiler Works, Inc. **[1990 NLRB Lexis 778]**	Albert	E	X	
	Bowling II	C		X
	Shelley	C		X
	Brown	C		X
	Ciccociop po	C		X
	Roddy	C		X
21. Teledyne Industries, Inc. **[1990 NLRB Lexis 638]**	Fox	E	X	
	Cummings	C		X
22. Maryland Millwork Installers **[1991 NLRB Lexis 515]**	Saunders	E	X	
	Stanalonis	E	X	
	Gibson	E	X	
	Bush	E	X	
	Vahtras	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Rapier	E	X	
	Caruso	C		X
	Mueller	C		X
	Green	C		X
	Spears	C		X
23. Cumber-land Farms, Inc. **['91 NLRB Lexis 1318]**	Bartosh	E	X	
	Priest	E	X	
	Mariano	E	X	
	Morris	E	X	
	Gordon	C		X
	Cavaco	C		X
	Macrides	C		X
	Sweeney	C		X
24. Trimtex Knitting Mills, Inc. **[1991 NLRB Lexis 932]**	Gordon	E	X	
	Daniels	E	X	
	Grinberger	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
25. R.G.N. Enterprises, Inc **[1991 NLRB Lexis 494]**	Stein	E	X	
	Dekoster	E	X	
	Gerstein	E	X	
	Wojcik	E	X	
	Williams	E	X	
	Naso	C		X
	Moore	C		X
	Milkowich	C		X
	Miller	C		X
26. Paramount Liquor Company **[307 NLRB No. 110]**	Holland	C	X	
	Rudolph	C	X	
	Reichhardt	C	X	
	Van Hoose	E		X
	Sanders	E		X
	Welch	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
27. F.W. Woolworth Co. **[1991 NLRB Lexis 719]**	Lopez-Ruyol	E	X	
	Mouliert	E	X	
28. Kenosha Auto Transport Corp. **[302 NLRB No. 148]**	Williams	E	X	
	Atha	E	X	
	Routzahn	E	X	
	Langen	E	X	
	Hensley	E	X	
	Johnson	E	X	
	Birdsall	C		X
	Crum	C		X
	Burgel	C		X
	Insley	C		X
	Mammolite	C		X
	Cornell	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
29. Amperage Electric, Inc. [301 NLRB No. 2]	Morrice	E	X	
	Cooper	E	X	
	Presley	E	X	
	Beamish	E	X	
	Bond	E	X	
	Vyskocil	E	X	
	Andres	E	X	
	Burman	E	X	
	Bower	E	X	
	Boyd	E	X	
	Newberry	C		X
	Telesz, K	C		X
	Telesz, L	C		X
	Zimmer-man	C		X
	Harris	C		X
30. Keystone Casing Supply, Inc. [196 NLRB No. 138]	Godlewski	E	X	
	Maust	E	X	
	Petrucci	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Sartore	C		X
31. Matlack, Inc. and Local 6 **[278 NLRB No. 36]**	Limsen-bigler	E	X	
	Reph	E	X	
	Bear	E	X	
	Rice	E	X	
	Flamisch	E	X	
32. A&W Foods, Inc. & Local 880 **[276 NLRB No. 20]**	DeSantis	E	X	
	Snow	C		X
	Calassi	C		X
33. Pennsy Supply, Inc. **[295 NLRB No. 37]**	Trammel	E	X	
	Allen	E	X	
	Brugger	C		X
	Haskins	C		X
	Eshleman	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
34. Maben Energy Corp. [295 NLRB No. 23]	Phalen	E	X	
	Accord	E	X	
	Wise	C		X
35. Professional Porter & Window Cleaning Co. [275 NLRB No. 4]	Taylor	E	X	
	Levy	C		X
	Joynes	C		X
	Swartz	C		X
	McQueen	E		X
36. Capital Rubber & Specialty Co. [201 NLRB No. 95]	Hernandez	E	X	
	Bridges	E	X	
	Sansone	E	X	
	Johnson	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Cooper	E	X	
	Abrams	E	X	
	Jones	E	X	
	Tucker	E	X	
	Drewery	E		X
	Montague	E		X
	Pedes-cleaux	E		X
	Scholl	C	X	
37. TCC Center Companies, Inc. **[275 NLRB No. 85]**	Carr	E	X	
	Dulmage	E	X	
	Hawes	C	X	
	Eiseli	C	X	
	Latour	C	X	
	MacDonald	C	X	
	Klein-brook	C	X	
	Handley	E		X
38. Nabisco Brands, Inc. **[286 NLRB No. 136]**	Brassil	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Arsenio	E	X	
	Nunes	E	X	
	Sousa	C		X
	Skoff	C		X
	Rigby	C		X
	Copera	C		X
	Stadnicki	C		X
	Cabral	C		X
39. Five M Coal Corp. [281 NLRB No. 502]	Barnes	E	X	
	Stevenson	E	X	
	Charles	E	X	
	Adkins	E	X	
	Casey, M	E	X	
	Casey, C	E	X	
	Henderson	E	X	
	Blanken-ship	C		X
	Meadows, B	C		X
	Meadows, J	C		X
	Hilton, J	C		X
	Hilton, R	C		X
	Smith	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
40. Georgia Pacific Corp. **[281 NLRB No. 2]**	O'Briant	C	X	
	Purifoy	C	X	
	Weaver	C	X	
	Foster	C	X	
	Winstead	C	X	
	Doolittle	E		X
	Hamm	E		X
	Coleman	E		X
	Prince	E		X
41. T.E. Elevator Corp. of Conn. **[291 NlRB No. 151]**	Morrill	C		X
	Euell	C	X	
	DeRosa	E		X
42. Sea Bay Home for Adults **[253 NLRB No. 68]**	Russo	E	X	
	Blisko	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
43. Bay Medical Center, Inc. **[252 NlRB No. 159]**	Chiodini	E	X	
	Uhlman	E	X	
	Wisnowski	E	X	
	Wharton	C		X
44. E.R. Carpenter Company, Inc. **[284 NLRB No. 39]**	Barrow	E	X	
	Shoemake	E	X	
	Meguiar	C		X
	Grimes	C		X
45. Browning's Foodland, Inc. **[284 NLRB No. 104]**	Abe	E	X	
	O'Rourke	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
46. Garrett Hallroad Car & Equipment **[275 NLRB No. 151]**	Grossinger	E	X	
	Mannarino	E	X	
	Luffey	E	X	
	Boots	E	X	
	Johnson	C		X
	Donahue	C		X
	Ferber	C	X	
47. Leak Repairs, Inc. **[241 NLRB No. 38]**	Jenkins	E	X	
	Paver	E	X	
	Gazelle	E	X	
	Durham	E	X	
	Leone	C		X
	Thompson	C		X
	Harrision	C		X
	Spencer	C		X
	Randolph	C		X
	Grace	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
48. Peoples Cartage, Inc. **[229 NLRB No. 187]**	Pappas	E	X	
	Nelson	E	X	
	Nicholson	E	X	
	Slabach	C		X
49. D & I Trucking, Inc. **[237 NLRB No. 11]**	Mullins	E	X	
	Parks	E	X	
	Maxwell	E	X	
	Warf	E	X	
	Mason	E	X	
	Cornett	C		X
50. St. Regis Paper Co. **[232 NLRB No. 166]**	Melanson, L.	E	X	
	Melanson, A.	E	X	
	Birmingham	E	X	
	Hare	E	X	
	Brown	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Ewer	E	X	
	Jordan	E	X	
	Cope	C		X
	Floyd	C		X
51. St. Agnes Medical Center [287 NLRB No. 26]	Porta	E	X	
	James	E	X	
	Mobley	E	X	
	Chambers	E	X	
	Feulner	E	X	
	Feldman	E	X	
	DiDomen-ico	E	X	
	Holmes	E	X	
	Colazzo	E	X	
	Hilbert	E	X	
	Capaldi	C		X
	Sams	C		X
	Callaghan	C		X
	Plotkin	C		X
	DiBartolo	C		X
	McLaughli n	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
52. Crestwood Auto Supply Co. **[240 NLRB No. 127]**	Shackles	E	X	
	Eldridge	E	X	
	Cantrell	E	X	
	Buckley	E		X
53. Virginia Holmes Mfg. of Del. **[239 NLRB No. 123]**	Moore, O.	E	X	
	Moore, W.	E	X	
	Decker	E	X	
	Farrone	E	X	
	Cronic	E	X	
	Lathbury	E	X	
	Absher	E	X	
	Toomey	E	X	
	Thompson	C		X
54. K Mart Corp. **[238 NLRB No. 166]**	Falk	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Necker-mann	E	X	
	Price	E	X	
	Szyula	C		X
	Palmer	C		X
55. King Radio Corp. **[208 NLRB No. 82]**	Johnson	C	X	
	Holiday	C	X	
	Brown	E		X
	Scales	E		X
	Jamison	E		X
	Lovett	E		X
56. Kings Terrace Nursing Home **227 NLRB No. 47]**	Rizzo	E	X	
57. Allied Products Corp. **[218 NLRB No. 188]**	Hensge	C	X	
	Veil	C	X	
	Moore	E	X	
	DeMott	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
58. Diebold, Inc. [210 NLRB No. 138]	Won	E	X	
	Palo	C		X
59. Indianapolis Power & Light Co [273 NLRB No. 211]	Bailey	E	X	
	Presly	E	X	
	Lucas	E	X	
	Thompson	E	X	
	Richards	E	X	
	King	E	X	
	McGraw	C		X
	Fogleman	C		X
	Summer	E		X
60. Culmtech Ltd & George Boston [283 NLRB No. 25]	Casala	E	X	
	Pachucki Sr.	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Pachucki Jr.	E	X	
	Gostinski	E	X	
	Ward	E	X	
	Boston's	E	X	
	Bianco	C		X
	Small	C		X
	Troup	C		X
	Gorcenski	C		X
61. Mediter-ranean Diner, Inc. **[279 NLRB No. 77]**	Fairfield	E	X	
	Nicholas	C		X
	Vlastaris	C		X
62. Magic Chef, Inc. **[288 NLRB No. 3]**	Foust	C	X	
	Cubitt	E		X
	Phalin	E		X
	Lemmons	E		X
63. South Shore Hospital **[245 NLRB No. 110]**	Shea	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Topham	C		X
64. Twin County Grocers, Inc. **[244 NLRB No. 168]**	Henry	C	X	
	Gugliuzzi	C	X	
	Richard-son	C	X	
	Presutti	C	X	
	Hanks	E		X
65. Ridgeway Trucking Co. **[243 NLRB No. 160]**	Surbaugh	C	X	
	Hudson	E	X	
	Shepard	E	X	
	White	E	X	
	Egan	E	X	
	Price	E	X	
	Peterson	E		X
	Griffin	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
66. Cleveland Express, Inc. **[222 NLRB No. 63]**	Wilson	E	X	
	Lane	E	X	
	Tate	E	X	
	Bryant	C	X	
67. Miner Industries, Inc. **[285 NLRB No. 36]**	Guida	C		X
	Ashcroft	C		X
68. American Parts System **[232 NLRB No. 8]**	Lerten	C	X	
	Lauver	C	X	
	Smithson	C	X	
	Hunsberg-er	E		X
	Thomas	E		X
	Shughart	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
69. Auburn Foundry, Inc. **[284 NLRB No. 33]**	Gambill	E	X	
	Phillips	C		X
70. Dayton Tire & Rubber Comp. **[207 NLRB No. 108]**	Grammont	E	X	
	Rose	E	X	
	Hoover	E	X	
	Angel	E	X	
	Kinder	C		X
	Sanders	C		X
	Hoffman	C		X
	Sloan	C		X
	Savage	C		X
	Hammer	C		X
	Hurley	C		X
	Hembree	C		X
	Franks	C		X
	Blair	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
71. National Grange Mutual **[207 NLRB No. 74]**	Wilga	E	X	
	Schad	E	X	
	Bouchard	E	X	
	Murphy	C		X
	Clark	C		X
	Whitney	C		X
	Mitchell	C		X
72. Essex International, Inc. **[213 NLRB No. 47]**	Bell	E	X	
	Bebout	E	X	
	Davis	E	X	
	Doherty	C		X
	Schock	C		X
	Olson	E		X
	Hale	E		X
73. Felsa Knitting Mills, Inc. **[208 NLRB No. 79]**	Manrique	E	X	
	Belevan	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Gorski	C		X
74. Illinois Central Community [224 NLRB No. 93]	Vallo	E	X	
	Ward	E	X	
	Mendes	E	X	
	Henning	C		X
	Kunnath	C		X
75. Allis Chalmers Corp. [224 NLRB No. 158]	Cummings	C	X	
	Booth	C	X	
	Equitz	C	X	
	Maxey	C	X	
	Boyd	C	X	
	Pilgrim	C		X
	Platner	C		X
	Nowlin	C		X
	Cole	C		X
	Morris	C		X
	Woodth-rope	E	X	
	Ivy	E	X	
	Ainsworth	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Foster	E	X	
	Shurlds	E	X	
	McCarty	E	X	
	Lambkin	E	X	
	Robbins	E	X	
	Pierce	E	X	
	Davis	E	X	
	Brown	E	X	
	Powell	E	X	
	Williams	E	X	
	Gilbert	E	X	
76. Emerson Electric Co. **[251 NLRB No. 50]**	Volner	E	X	
	Minard	E	X	
	Barnett	E	X	
	Meek	E	X	
	Hazard	E	X	
	Ashton	E	X	
	Darnell	C		X
	Joellen-beck	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
77. Ford Motor Company [251 NLRB No. 66]	Siriani	E	X	
	West	E	X	
	Keller	C		X
	Woold-ridge	C		X
	Dudek	C		X
	Luyckx	C		X
	Pellegrini	C		X
	McCall	C		X
	Nietubicz	C	X	
	Brady	C	X	
78. Intl. Union of Operating [255 NLRB No. 600]	Glazier	E	X	
	Harrah	E	X	
	Hayhurst	E	X	
	Holt	E	X	
	Handley	C		X
	Maddox	C		X
	Pruett	C		X
	Barnett	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
79. W. T. Grant Company **[214 NLRB No. 96]**	Swinick	E	X	
80. Howard Johnson Company **[278 NLRB No. 108]**	Burnand	E	X	
	Eliasson	E	X	
	Sauerwein	C		X
	Bower	C		X
81. Standard Materials, Inc. **[286 NLRB No. 52]**	Leonard	E		X
	Allen	E	X	
	Beard	E	X	
	Cousin	E	X	
	Crawford	E	X	
	Edwards	E	X	
	Favre	E	X	
	Hart	E	X	
	Hinton	E	X	
	Jenkins C.	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Jenkins J.	E	X	
	Orange	E	X	
	Owens, A.	E	X	
	Owens, O.	E	X	
	Owens, T.	E	X	
	Paige	E	X	
	Panks	E	X	
	Peters	E	X	
	Pope	E	X	
	Wise	E	X	
82. Western Waste Industries [274 NLRB No. 35]	Pearson	E	X	
	Chapman	E	X	
	Anderson	E	X	
	Thomas	E	X	
	Stanley	E	X	
	Green	E	X	
	Blackmon	E	X	
	Kimb-rough	E	X	
	Ingram	E	X	
	Orders	C		X
	McGlash-an	C		X
	Armstrong	C		X
	Brown	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Rosinski	C		X
83. Advanced Mining Group **[260 NLRB No. 73]**	Shank	E	X	
	Roudebush	E	X	
	Mikulan	E	X	
	Clawson	E	X	
	Jackson	E	X	
	Smith	E	X	
	Baker	E	X	
	Peterman	E	X	
	Marsh	E	X	
	Lamar	E	X	
	Randolph	E	X	
	Black	E	X	
	Wannett	E	X	
	Radulo-vich	E	X	
	Einstein	C		X
	Cassidy	C		X
	Rhoades	C		X
84. Medical Center News, Inc. **[263 NLRB No. 139]**	J. Miller	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Massey	E	X	
	McNeal	C		X
	Saunders	C		X
	Whitlock	C		X
	E. Miller	C		X
85. Great Western Coca Coca **[265 NLRB No. 189]**	Mica	C		X
	Meier	C		X
	Ferguson	C		X
	Ross	E	X	
	Gatson	E	X	
86. Continental Distributing Co. **[256 NLRB No. 91]**	Rich Strom	E	X	
	Davis	E	X	
	Roy Strom	C	X	
	Cooper	C		X
	Preston	C		X
	Swachig	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
87. Wells Fargo Armored Service **[270 NLRB No. 106]**	Votta	E	X	
	R. Kelley	E	X	
	Relay	E	X	
	Mangan	E	X	
	Petrie	E	X	
	Hurley	E	X	
	J. Kelley	E	X	
	Caputo	E	X	
	Maguire	E	X	
	Hughes	C		X
	Gamber	C		X
	Stratford	C		X
	Isaacs	C		X
	Prisciandro	C		X
88. Vin James Plastering Co. **[226 NLRB No. 26]**	Ward	C	X	
	Smith	C	X	
	Fernandez	C	X	
	Wallace	C	X	
	Scrandra	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
89. The Adrian Daily Telegram [214 NLRB No. 157]	Hatch	E	X	
	Baysinger	C		X
90. Blackman-Uhler Chemical [220 NLRB No. 14]	Pagh	E	X	
	Wease	E	X	
	Carnes	E	X	
	Holcomb	E	X	
	Dodkin	E	X	
	Coggins	E	X	
	Taylor	E	X	
	Austin	E	X	
	Thornton, S.	E	X	
	Thornton	C		X
	Foster	C		X
	Poltersdorf	C		X
91. Pizza Pizzaz, Inc. [248 NLRB No. 37]	Pappas, A.	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Pappas, W.	E	X	
	Zahran	E	X	
	Sullivan	E	X	
	McManus	C		X
	Fallon	C		X
92. Garrison Valley Center [246 NLRB No. 114]	Chee	E	X	
	Curtis	E	X	
	Morris	E	X	
	Thompson	E	X	
	Williams	C		X
	Shidmore	C		X
	Campan-ella	C		X
93. Americana Health Care [252 NLRB No. 57]	Brown	E	X	
	Noaker	E	X	
	Reeves, D.	E	X	
	Reeves, T.	E	X	
	Dowdell	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Schimer	C		X
	Covert	C		X
	Bango	C		X
94. Nat'l Detective Bureau **[204 NLRB No. 7]**	Negron	C		X
	Beltran	C		X
	Sierra	E	X	
	Franquiz	E	X	
	Quinones	E	X	
	Diaz	E	X	
	Bordewyk	E	X	
	Otero	E	X	
	Moldonado	E	X	
95. Maben Energy Corp. **[295 NLRB No. 23]**	Wise	C		X
	Phalen	E	X	
	Accord	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
96. Electric Energy, Inc. **[296 NLRB No. 76]**	Stairs	C	X	
	Hefner	C	X	
	Giljum	E	X	
97. Murphy Printing Co., Inc. **[235 NLRB No. 90]**	Aldrich	C		X
	Homnick	C		X
	Blank	E	X	
	Diglio	E	X	
98. Boaz Spinning Company **[206 NLRB No. 62]**	Amos	E	X	
	Garrard	E	X	
	Walker	E	X	
	Smith	E	X	
	Pierce	E	X	
	Gore	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
99. Overnite Transportation **[296 NLRB 669]**	Edwards	C		X
	Johnson	C		X
	Pollard	C		X
	Roberts	E	X	
	Phillips	E	X	
	Garcia	E	X	
	Mendoza	E	X	
	Thelan	E	X	
	Charone	E	X	
100. U.S. Postal Service **[306 NLRB No. 120]**	Templeton	C	X	
	Mulligan	C	X	
	Barranca	C	X	
	Downes	C	X	
	Burditt	C	X	
	Burrus	E		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
101. E.I. Dupont De Nemours & C. **[1991 NLRB Lexis 366]**	Davis	C		X
	Warren	C		X
	Huff	C		X
	Thomas	E	X	
	Pearce	E	X	
	Shaffer	E	X	
102. Steak and Ale Restaurant **[263 NLRB No. 14]**	Smith, T.	E	X	
	Smith, D.	E	X	
	Emmons	E	X	
	Shanderski	C		X
	Edwards	C		X
103. National Broad-casting Co. **[252 NLRB No. 133]**	Bichl	E		X
	Hrehocik	E		X
	Brand	C	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
104. George Banta Co., Inc. **[256 NLRB No. 55]**	Miller	E	X	
	Schmeling	E		X
	Spielbauer	E	X	
	Douglas	E	X	
	Galbraith	E	X	
	O'Connor	E	X	
	Holcomb	E	X	
	Grimmer	E	X	
	Schmeling	E	X	
	Williams	E	X	
	DeWildt	E	X	
	Secor, M.	E	X	
	Secor, P.	E	X	
	Bartz	E	X	
	Rajski	E	X	
	LaSelle	E	X	
	Fox	E		X
	Pontow	E		X
	Bojarski	E		X
	Schreiner	E		X
	Ahuens	E		X
	Emmerich	C	X	
	Rull	C	X	X
	Hue	C	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
105. Brodart, Inc. [257 NLRB No. 77]	Keller	E	X	
	Metzger	E	X	
	Snodgrass	C		X
	Lupacchino	C		X
106. Thurston Motor Lines, Inc. [257 NLRB No. 172]	Duke	E	X	
	Burney	E	X	
	Addis	E	X	
	Carter	E	X	
	Lovett	E	X	
	Holmes	E	X	
	Dyer	C		X
	Holscher	C		X
	Martin	C		X
107. Faulkner Hospital [259 NLRB No. 52]	Walsh	E	X	
	Folker	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	McBrine	C		X
	O'Brien	C		X
108. A.J.R. Coating Division [292 NLRB No. 31]	Oswald	C		X
	Petrizzo	C		X
	Coyne	C		X
	Rappa	C		X
	Ferner	C		X
	Lewis	C		X
	Gleason	C		X
	Joven	C		X
	Reardon	C		X
	McKeener	C		X
	Dankulich	E	X	
	Marsilio	E	X	
	Ahn	E	X	
	Boyko	E	X	
	Snell	E	X	
	Berlew	E	X	
	McDade	E	X	
	Dornbach	E	X	
	Miller	E	X	
	Pearn	E	X	
	Donello	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
109. Hochschild Kohn **[260 NLRB No. 25]**	Gilmore	E	X	
	Bull	E	X	
	Sheleey	E	X	
	O'Connor	E	X	
	Gladden	E	X	
	Lieght	E	X	
	Pfeifer	E	X	
	Morgan	C		X
	Horinka	C		X
	Warner	C		X
	Suliga	C		X
110. Trumbull Memorial Hospital **[288 NLRB No. 153]**	Avambasic	E	X	
	Brandt	E	X	
	Benson	E	X	
	Callion	E	X	
	Campana	E	X	
	Bennet	E	X	
	Grayer	E	X	
	Davis	E	X	
	Gardiner	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Greene	E	X	
	Austin	E	X	
	Butcher	E	X	
	McIntyre	E	X	
	Sanders	E	X	
	Wilson	E	X	
	Thompson	E	X	
	Toriello	E	X	
	Dawson	E	X	
	Honey-wood	E	X	
	Rolfe	E	X	
	Ipsa	E	X	
	Kandic	E	X	
	Johnson	E	X	
	Capellas	E	X	
	Burr	E	X	
	Stevens	E	X	
	Sonder-man	E	X	
	Henline	E	X	
	McNeal	E	X	
	McKinney	E	X	
	McKinney	E	X	
	Libich	E	X	
	Ward	E	X	
	Baxter	E	X	
	Nieswang-er	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Walter-mire	E	X	
	Lloyd	E	X	
	Paige	E	X	
	Shick	E	X	
	Rogusky	E	X	
	Marks	E	X	
	Powrozny k	E	X	
	Flavell	E	X	
	Whetstone	E	X	
	Dills	E	X	
	Williams	E	X	
	Crump	E	X	
	Smith	E	X	
	Leposky	E	X	
	Schultz	E	X	
	Jefferies	E	X	
	Sowers	E	X	
	Dotson	E		X
	VanZandt	E	X	
	Janetzke	E	X	
	Price	E	X	
	Clutters	E	X	
	Pough	E	X	
	Martina	E	X	
	Hill	E	X	
	Eberts	E	X	
	Price (2)	E	X	
	Brindza	E	X	

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Ignatz	E	X	
	Hunt	E	X	
	Horne	E	X	
	Thomas	E	X	
	Jones	E	X	
	McVicker	E	X	
	Latham	E	X	
	DiGia-cobbe	E	X	
	Dodge	E	X	
	Heim	E	X	
	Howard	E	X	
	Harris	E	X	
	Gilliam	E	X	
	Borowik	E	X	
	Copen-haver	E	X	
	Ullom	E	X	
	Chapman	E	X	
	Cove	E	X	
	Harris	E	X	
	Lenhart	E	X	
	Mickens	E	X	
	Gross	C	X	
	Simco	C	X	
	Schooley	C	X	
	Carlson	C		X
	Kuppler	C		X
	Johns	C		X
	Smith	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
	Moderalli	C		X
	Fabrizio	C		X
	Maloney	C		X
	Gaskell	C		X
	McLean	C		X
111. ACF Industries, Inc. **[1992 NLRB Lexis 841]**	Rosko	C		X
112. Horizon Foods, Inc. **[280 NLRB No. 127]**	Hayden	E	X	
	Williams	E	X	
	Hibbler	E	X	
	Gersknow-ski	E	X	
	Unason	E	X	
	Rice	E	X	
	Baldwin	E	X	
	Alexander	E	X	
	Rogers	E	X	
	Stricker	C		X
	Tadros	C		X

CASE NAME	WITNESS	PARTY	CREDIT	DIS-CREDIT
113. Rockwood Energy & Mineral **[1990 NLRB Lexis 459]**	Mardula	E	X	
	Thrower	E	X	
	Barr	E	X	
	Miller	E	X	
	McVicker	E	X	
	Geisbrecht	E	X	
	Constant-ino	E	X	

APPENDIX F

NLRB v. John Conlee Enterprises, Inc.
Case No. 96-5691

Statistical Analysis
ALJ Itkin Witness Credibility Evaluations 1973-1995*

Actual Probability of Crediting Witness	Expected number of credits for 572 total witnesses	Standard deviation (for 572 total witnesses)	Standard deviations from the norm if 532 credits observed	Probability of 532 or more credits out of 572	Odds
0.5	286	12.0	20.6	4.19E-111	1 out of 2385065728310380000000000

Actual Probability of Crediting Witness	Expected number of credits for 572 total witnesses	Standard deviation (for 572 total witnesses)	Standard deviations from the norm if 532 credits observed	Probability of 532 or more credits out of 572	Odds
0.6	343	11.7	16.1	7.73E-73	1 out of 1293009779299560000000000

Judge's Probability of crediting witness	Probability of seeing 532/572 witnesses credited	Odds of seeing 532/572 witnesses credited
50/50	4.19E-111	1 out of 2385065728310380000000000

APPENDIX G

NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

(PART ONE)

UNFAIR LABOR PRACTICE PROCEEDINGS

* * *

I have been given assurances by an agent of the National Labor Relations Board that the affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

10059.6 *Translation/Certification of Affidavits Taken in a Foreign Language:* When an affidavit is taken in a foreign language and the Regional Office has translated into English, the translator should add the following certification at the end of the affidavit:

> I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translationis an accurate

translation of the attached [insert name of foreign language that was translated] language original affidavit.

_____ _____

Date [Type name of translator]

10060 *Credibility:* In the event of hearing, credibility questions may be critical. In view of this, the following points should be kept in mind.

On the basis of its investigation the Regional Office is expected to resolve factual conflicts.

Often a factual conflict arises out of the misunderstanding of the questions or out of the conclusionary nature of the questions asked or the answers given. The repetition of questions in different forms may help to resolve the conflict. Emphasis should be placed on obtaining factual details rather than the opinions and conclusions of the witnesses. Probing into details otherwise deemed to be insubstantial may be called for in order to determine whether there is a propensity for a "careless" handling of detail.

Where a witness has been contradicted on a relavant fact since he/she last gave testimony, he/she should be reinterviewed. And, to the extent further reinterview of witnesses will help to resolve the issues, they should be undertaken.

Finally, in situations where factual issues are close, it may be

appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case).

It should be kept in mind that a witness' appearance and behavior at the time of interview, the existence or nonexistence of discrepancies irrelevant details, and even the consistency of prior statements or the witness' general reputation are only *indicators*. Nor does an unwillingness to sign or to swear to the truth of a statement have significance; except when related to the reasons for the refusal. The best indications of truthfulness lie in the *probabilities* inherent in a given story (as opposed to another story) viewed in the light of the *entire pattern* of available evidence.

"In the infrequent case in which (a) applying all relevant principles, the Region is unable to resolve credibility, and (b) the resolution of the conflict *means the difference between dismissal and issuance of complaint,* a complaint should be issued. This is not to be construed, however, as permitting the avoidance of the making of difficult decisions.

10062 *Assignment of Attorney:* A case may be assigned to an attorney, in lieu of or in addition to an examiner, at the very outset of the case where the complexity of the case (e.g., a CC or a CD case), the patency of legal problems at the outset, or the availability of regional personnel indicates it.

Where a field examiner and an attorney are assigned to a case, or whenever two or more Board agents are assigned to a case or task. responsibility for progress should be specifically fixed by the assigning supervisor or supervisors. In the absence of notice to the contrary, responsibility for progress of a case

assigned at its filing to a field examiner shall reside in the examiner until the responsibility is specifically shifted.

While an attorney is assigned to a case but is not responsible for progress, an attorney is the legal advisor and chief legal consultant and will, when necessary, interview witnesses or conduct other required investigation. While the field examiner is assigned to a case but is not responsible for progress, the field examiner will be available for any necessary investigative steps,

10064 *Amendments to Charge*

* * *

APPENDIX H

1998 U.S. App. LEXIS 1047 printed in FULL format.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JOY RECOVERY TECHNOLOGY CORP.,
Respondent.

No. 97-2001

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1998 U.S. App. LEXIS 1047

December 8, 1997, Argued

January 26, 1998, Decided

PRIOR HISTORY: [*1] Petition for Enforcement of a Decision and Order of the National Labor Relations Board.

DISPOSITION: The order of the National Labor Relations Board is enforced in its entirety.

COUNSEL: For NATIONAL LABOR RELATIONS BOARD, Petitioner: Elizabeth Kinney, NATIONAL LABOR RELATIONS BOARD, Region 13, Chicago, IL USA. Aileen

NLRB v. Joy Recovery Technology Corp.,
1998 U.S. App. Lexis 1047

A. Armstrong, William M. Bernstein, NATIONAL LABOR RELATIONS BOARD, Appellate Court, Enforcement Litigation, Washington, DC USA.

For JOY RECOVERY TECHNOLOGY CORPORATION, Respondent: John J. Toomey, ARNOLD & KADJAN, Chicago, IL USA. Donald W. Anderson, Daniel V. Kinsella, BURDITT & RADZIUS, Chicago, IL USA.

JUDGES: Before KANNE, ROVNER, and EVANS, Circuit Judges.

OPINIONBY: EVANS

OPINION: EVANS, Circuit Judge. The National Labor Relations Board seeks enforcement of its order requiring the Joy Recovery Technology Corporation to reinstate its transportation department and to bargain with Local 673 of the International Brotherhood of Teamsters.

The NLRB determined that Joy violated Section 8(a)(1) of the Labor Management Relations Act (29 U.S.C. § 158 (a)(1)) by interrogating employees, soliciting surveillance of union activities, and threatening employees with layoff if they selected the union as their bargaining representative; that the company violated Section 8(a)(3)(1) of the Act by the discriminatory discipline of employee Edward Kizior for union activity and the unlawful closing of its transportation department and the termination of the employees, all at its facility in Aurora, Illinois. The Board ordered the company to cease and desist from the unfair labor practices, to reestablish its transportation department as it previously

existed, to reinstate employees unlawfully terminated, to expunge from its files references to the unlawful suspensions, and to post copies of a remedial notice. In addition, the Board entered a bargaining order, pursuant to NLRB v. Gissel Packing Co., 395 U.S. 575, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969).

Joy is involved in the reclamation and recycling of scrap wire and other materials for Ameritech, its only customer. Ameritech retains title to the scrap up to the point of resale. Up until the events of this case, Joy maintained a transportation department and transported the scrap using its own employees and equipment, as well as contracting with independent carriers. The transportation department had nine employees.

In late May 1994 transportation department driver Ed Kizior contacted Robert "Ace" Warren, a Teamsters representative, to find out about obtaining union representation. Kizior arranged for a meeting between Warren and the employees on July 9, 1994. The employees, who were present, signed union authorization cards, and on July 11 the union filed a petition seeking certification. On July 13 Joy received formal notice that the petition had been filed.

On August 5 Kizior [*3] received a written warning stating that he and employee Jose Lopez had taken a company truck without prior authorization and that he would be suspended for 3 days without pay. He claims the use of the truck was authorized to take Lopez to his drivers license exam.

By August 11 Joy distributed a memo to employees saying that the transportation department had caused financial losses to the company, that it would be closed, and that the company would rely on contracts with common carriers, effective August 22. On August 12 the company wrote the union, informing it of the above and that it would be notifying its drivers of the decision to terminate their employment.

The Board found that during July--the time when the employees were meeting with union representatives--the company engaged in inappropriate conversations with employees. Company manager Mark Matza asked employee Michael Watson which employees had signed union cards. Watson said he did not know. Matza reportedly told Watson that "something is going to have to be done" because he did not want it [apparently referring to the union] to "spread throughout the whole plant." During mid-July company supervisor Roberto Baltazar [*4] asked Lopez (the employee involved in the truck incident) if he knew anything about the union and which employees had signed union cards. Lopez lied and said he did not. Baltazar also wanted to know if anyone had asked Lopez to sign a card and whether he knew who the head of the union was. Baltazar reportedly told Lopez that they did not need a union at the company.

In addition, the Board found that manager Matza discussed the transportation department with Julia Chandler, a dispatcher for the department. Matza told Chandler that he was interested in knowing who had contacted the union. He asked if it was Kizior, but Chandler refused to say. Matza then asked if it was Dave Woodard, who, Matza said, had previously mentioned "getting a union in there." Matza asked

Chandler whether there was anything that the company could offer the employees to "make them not seek representation." He also asked her where the union meetings were held, who attended them, and whether she could obtain copies of union literature. Incredibly, he asked her to take a tape recorder into a meeting to surreptitiously record it. Matza asked Chandler's opinion of closing the transportation department. This was the [*5] first time she had heard anything about closing the department, and she asked if the union had anything to do with the company's having the idea to close it. He said that the union "did play a major part" in the decision.

Other findings include that general manager Simon Pawlenko also discussed the union with Chandler, telling her he thought she had brought the union in. He subsequently told her to use more outside carriers for transporting scrap to Joy's facilities.

The company had always used some outside carriers, and maintaining its transportation department had been troublesome because the operation was small and inefficient. In fact, Ameritech complained about the transportation services Joy provided. On July 29, 1994, Ameritech wrote to Matza and pointed out that there had been dissatisfaction with scrap pickups and that Ameritech would continue to allow Joy to handle the transportation of scrap for 30 days, but if by September 1 there was not significant improvement, Ameritech would put into place alternative transportation processes.

Sometime in late 1993 or early 1994, before the union activity began, the company talked with James Bowman about

the problems in the department, [*6] and he was hired to do a study. There is a dispute as to the purpose of the study. The employees who testified at the hearing in this matter said that when Bowman spoke with them, he asked questions regarding how to improve the department. Joy, on the other hand, said he was hired to do a distribution study to determine alternatives to the department. The NLRB found that the original purpose of hiring Bowman was to study how to improve the department; the company wanted to continue to transport some of the materials itself to avoid making it easy for Ameritech to send materials elsewhere. Nevertheless, the company used the Bowman study to justify a decision to close the department.

Our review of the NLRB's order is limited. We uphold the factual findings if they are supported by substantial evidence in the record as a whole and we uphold the legal conclusions if they have a reasonable basis in the law. NLRB v. P * I * E Nationwide, Inc., 923 F.2d 506 (7th Cir. 1991). We affirm the Board's findings if they are supported by substantial evidence, even if we might have made a different finding. Central Transport, Inc. v. NLRB, 997 F.2d 1180 (7th Cir. 1993). As to credibility determinations when there are two conflicting versions of the same incident, the ALJ's credibility determinations are entitled to deference. We avoid redetermining credibility "on the basis of a cold record." Carry Companies of Illinois, Inc. v. NLRB, 30 F.3d 922, 928 (7th Cir. 1994).

In fact, in this case, the principal attack the company makes on the decision of the NLRB relates to the credibility findings of the ALJ. The company contends that this

particular ALJ is biased; that he always uses the same words in his decisions--the company calls it a "mantra"; and that he has never seen an unfair labor practice claim he did not like. A similar attack was made before the Board. Joy presented an analysis of how often the ALJ involved in this case credited General Counsel's witnesses rather than employer witnesses and contended that the ALJ was 4.6 times more likely to credit the former rather than employer witnesses. However, Joy is careful to make no representations regarding the reliability of the study except that its best efforts were used in compiling the information. That the study is clearly and admittedly unscientific undermines its usefulness. More importantly, as the NLRB points out, Joy [*8] analyzed cases in which the respondent was a company but did not include any cases in which a union was the respondent. What may be true is that the ALJ may have in the past believed the NLRB's witnesses more often than a respondent's witnesses, whether that respondent was a company or a union. Given that we have no reason to believe that the NLRB brings cases without making its own determination as to whose story is credible, that result may not be much more surprising than that the conviction rate of U.S. Attorneys is vastly higher than the acquittal rate of defense attorneys, a comparison which, we believe, underlines the danger in our crediting statistical studies of credibility determinations.

The primary point here is, however, that generally decisions are most appropriately reviewed carefully and on their own merits. And that is what the Board did in this case. It looked at the record and concluded that the credibility findings were entitled to deference. We agree. It is not true, as Joy contends, that the ALJ simply made blanket statements

regarding credibility. The ALJ in this case was confronted with two explanations of events, two versions of the story. In such a case a [*9] judge must decide which one is more credible. We think a statement such as the following to be a quite adequate explanation of his choice:

> And, I reject here as equally incredible the assertions by Matza, Young and Bowman that the Employer's sudden decision on August 11 to resort to total outsourcing or total subcontracting of its transportation services was not in response to or caused by the transportation department employees turning to the Union to represent them. The credible evidence of record, as discussed below, demonstrates that Respondent Employer had operated its transportation department at a financial loss for many months; had instituted comprehensive studies and actions then under way to improve its services in this department and had not taken any steps to totally outsource or totally subcontract its transportation services until the employees sought Union representation. I am persuaded on this record that the Employer's sudden August 11 decision to totally outsource or totally subcontract this work was in response to this employee protected activity and would not have occurred had the employees not sought Union representation.

> The judge on the [*10] front line is in the best position to determine which of two stories told by competing witnesses should be credited.

We will turn now to the merits. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of the right to

organize. The test for determining whether a violation has occurred is whether an employer's actions had a reasonable tendency to interfere with or coerce employees, not whether the employer intended to interfere. NLRB v. Q-1 Motor Express, 25 F.3d 473 (7th Cir. 1994), cert. denied, 513 U.S. 1080, 115 S. Ct. 729, 130 L. Ed. 2d 633 (1995). Whether an employer's questioning of an employee is coercive depends on the factual context in which the questioning occurs. NLRB v. Shelby Mem'l Hosp. Ass'n, 1 F.3d 550 (7th Cir. 1993). The testimony of the employees, credited by the ALJ and the Board, is clearly sufficient to support a finding of coercion. The testimony shows a sense of company hostility toward the union, and certainly, for instance, asking an employee to secretly tape record union meetings is coercive. That the employees felt coerced is shown by the fact that they lied in response to [*11] questioning by company agents.

However, the company contends that its questioning of Julia Chandler was not unlawful because she was a supervisor. We note at the outset that the burden of establishing supervisory status is on the one asserting it. NLRB v. Bakers of Paris, Inc., 929 F.2d 1427 (9th Cir. 1991). On this point, Chandler's credibility is much in dispute because her description of her authority is partial support for the claim that she was an eligible member of the bargaining unit. She says that she did not have the power to hire or fire. She acknowledged that she recommended that certain employees be disciplined but maintained that someone higher up the chain of command had to approve the action. The company contends that she had authority to approve overtime, days off, and cash advances of up to $ 300. Those powers, along with her authority to recommend discipline and

discharge, gave her, the company says, authority similar to the dispatcher, who was found to be a supervisor, in E & L Transport Co. v. NLRB, 85 F.3d 1258 (7th Cir. 1996).

The Board's determination as to whether a particular position is supervisory within the Act is an application of law to fact, reviewed under the substantial evidence standard. E & L, 85 F.3d at 1269. The definition of supervisor is found in § 152(11):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In that section Congress sought to distinguish between "genuine management prerogatives" and employees--such as straw bosses and lead men--who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-83, 40 L. Ed. 2d 134, 94 S. Ct. 1757 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

It is not always an easy distinction to draw, and a position as a dispatcher is one which falls on the line. In E & L we found that a dispatcher who used the title supervisor, issued reprimands, identified with management, [*13] attended management meetings, and oversaw a work force of

69 employees was a supervisor. He was also a salaried employee. Chandler, on the other hand, clearly did not identify with management, but with the 8 or so employees she was the dispatcher for. She was not salaried, but rather was paid $ 9 per hour, less than the drivers she dispatched. The incidents in which employees were disciplined upon her "recommendation" are not convincing evidence that she had supervisory status. After an incident of an employee throwing credit cards at her for the second time, Chandler went to plant manager Pawlenko to see whether there was any way to suspend the employee. Pawlenko told her to suspend the employee for three days. That is not compelling evidence that Chandler had authority to discipline the employee or even to effectively recommend discipline. Later Pawlenko apparently agreed to listen to the disciplined employee's side of the story. When, during the meeting of the two men, with Chandler present, the employee became abusive to Pawlenko, Pawlenko terminated him without ado. The other example put forward by the company to show Chandler's supervisory status involves an incident in which [*14] an employee feigned that he had been kidnaped and called Chandler, telling her that he was being held hostage. The incident frightened her, and she asked the plant manager to fire him. It would seem that any employee, including those unquestionably eligible for the bargaining unit, would have the right to request that a fellow employee be disciplined for either of these incidents. Had Chandler perceived herself as having, or had she been perceived by others as having, the authority to discipline or recommend discipline, one would expect her action in response to these events to be considerably more direct. There is substantial evidence in the record to support the Board's conclusion that Chandler was not a supervisor within the

meaning of § 152(11).

Section 8(a)(3) prohibits discrimination against any employee in order to discourage membership in a union. An employer violates Section 8(a)(3) by retaliating against employees for engaging in union activities. In NLRB v. Wright Line, a Division of Wright Line Inc., 251 N.L.R.B. 1083 (1980), the NLRB set out a framework for analyzing such claims. The Wright Line test requires General Counsel to prove that antiunion animus was a substantial [*15] or motivating factor in the employer's decision to make adverse employment decisions. The employer can then avoid a finding of an unfair labor practice if it can show that it would have taken the action regardless; that is, for legitimate reasons. The test was approved by the Supreme Court in NLRB v. Transportation Management, 462 U.S. 393, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983). However, in Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267, 129 L. Ed. 2d 221, 114 S. Ct. 2251 (1994), the Court rejected the interpretation of § 7(c) of the Administrative Procedure Act (5 U.S.C. § 556(d)) set out in Transportation Management but reaffirmed its holding. The Court stated:

The NLRB's approach in Transportation Management is consistent with § 7(c) because the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.

Greenwich Collieries has been read, nevertheless, as

a modest refinement or clarification of the Wright Line standard. It makes clear that the [*16] analysis does not simply require General Counsel to establish a prima facie case. General Counsel must establish that antiunion animus was a motivating factor in the decision. If General Counsel succeeds, the employer--to escape a finding of an unfair labor practice--must establish its affirmative defense--that it would have taken the action regardless for nondiscriminatory reasons. See Schaeff Inc. v. NLRB, 324 U.S. App. D.C. 311, 113 F.3d 264 n.5 (D.C. Cir. 1997).

In this case, timing is everything. The closing of the department comes on the heels of the union's organizational activity. But it also follows a troublesome time with the transportation department and, in fact, a study of the department. In a sense, timing supports both sides. We think, however, that on the record as a whole, there is substantial evidence to support the finding that the decision to close the department was a result of antiunion animus. The timing of the elimination of the department, coming as it did, right after the union sought recognition, the testimony that the Bowman study was initially commissioned to improve the department, the fact that Joy had seemed to want to have a transportation department so that it would be harder for Ameritech to ship to other recyclers--or easier to ship to Joy, and the fact that the company maintained the department, unprofitably, for a significant period of time--all provide substantial evidence for the decision reached by the Board rather than for the opposite conclusion that the department was closed for legitimate business reasons.

Similarly, there is evidence to support the finding that

the discipline of Kizior, who was correctly suspected of being behind the unionization effort, was unlawful. Again, the timing was suspicious. Also, the company explanation that Kizior was suspended for taking a truck without authorization is suspect. Chandler's records show that Pawlenko approved Kizior's taking the truck to take Lopez to his driver's test. That was all that Kizior did.

The next question involves whether the company had a duty to bargain about the closing of the department. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative of the employees over a mandatory subject of bargaining. The company says that it did not violate this section because it did not refuse to bargain, [*18] and in any event the union did not have majority status nor was the closing of the department a mandatory subject of bargaining.

Joy contends that majority status was not established because of supervisory participation in the unionization effort and furthermore that the union waived its right to bargain. Chandler is the alleged supervisor, so the claim as to supervisory participation in the unionization effort must fail for the reasons we have just noted. As to whether Joy was willing to bargain, Joy wrote a letter to the union on August 12 in which it said that if the union had majority status it would bargain over the effects of Joy's decision. The union did not respond to the August 12 letter in which this offer was made. The NLRB found that because the letter was merely an offer to bargain over a foregone conclusion, bargaining would be futile. There is substantial evidence to support this finding. A waiver of statutory bargaining rights must be clear and

unmistakable. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983). Here, the union did not waive its right to bargain; had it bargained it would merely have been lending legitimacy to the [*19] decision which had already been made.

Next, we must consider whether the Board was right to conclude that Joy had a duty to bargain over the closing of the department and subcontracting the work. Under Section 8(a)(5) (29 U.S.C. § 158(a)(5)), it is an unfair labor practice for an employer to refuse to bargain with the representative of the employees. Under § 158(d) the employer and the employees' representative have a mutual obligation to confer with respect to wages, hours, and "other terms and conditions of employment." One question, then, is whether the closing of the department involves a term or condition of employment.

Fibreboard Paper Products v. NLRB, 379 U.S. 203, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964), says that a decision to subcontract work is a mandatory subject of bargaining. However, in a subsequent case the Court determined that an entrepreneurial decision to close down part of a business for purely economic reasons is not a mandatory subject of bargaining. First National Maintenance Corp. v. NLRB, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981). The contrast is between a decision to substitute one set of employees for another and the decision to change the scope and direction of the business. However, in ruling for the employer in First National Maintenance, the Court emphasized that the motivation of the company was purely economic; there was no claim of antiunion animus. And the

Court pointed out that under Section 8(a)(3) a union is protected against a partial closing of an operation which is motivated by hostility toward the union. Here, the Board specifically adopted the ALJ's determination that Joy violated Section 8(a)(5). What two members of the Board said was that "it is well established that an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining when, as here, antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise." A third member would have found it unnecessary to decide whether Joy violated Section 8(a)(5) because the violation of Section 8(a)(3) is clear.

We find that there is substantial evidence to support the Board's decision. First, the decision to close the department was not made for purely economic reasons. And, secondly, we have found substantial evidence to support the Board's finding that hostility [*21] toward the union is the motivating force behind the decision. That finding prevents the application of First National Maintenance and also sustains a finding that the company violated Section 8(a)(3).

So we arrive at the issue as to whether the remedial order was an abuse of the Board's discretion. Joy contends that the part of the order requiring the restoration of the transportation department would be difficult and expensive. First, we note that the Board was within its authority to issue such as order unless the company demonstrates that a restoration order would be unduly burdensome. Jays Foods, Inc. v. NLRB, 573 F.2d 438 (7th Cir. 1978). Here, as the Board noted, Joy continues to have an ongoing contractual relationship with

Ameritech to provide trucking services and still owns all the equipment used to transport the scrap. Furthermore, two of its former employees work for one of the subcontractors.

Finally, we consider whether the bargaining order was appropriate. In Gissel the Court determined that the duty to bargain can arise without a Board election if majority status of the union can be established by union authorization cards and if the company engages in unfair labor [*22] practices which would undermine the ability to have a fair election. Furthermore, under Gissel the Board is granted significant discretion in the remedial orders it issues.

Here, there is clearly majority status. There are also unfair labor practices which would undermine the ability to hold a fair election. The unit is small; the employees have all lost their jobs; they were intimidated when questioned by high level managers even before the department was closed. There is a significant basis on which to issue a Gissel order to bargain. The order of the National Labor Relations Board is enforced in its entirety.